United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
JAMES M. BERGEN

76-7454, 80

United States Court of Appeals

FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,
Plaintiffs-Appellants-Cross-Appellees,

—against—

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,
Defendants-Appellees,

—and—

MORRIS LEVY,
Additional Defendant on Counterclaim-Appellant,

JOHN LENNON,
Defendant-Appellee-Cross-Appellant.

JOINT BRIEF FOR APPELLEE-CROSS-APPELLANT JOHN LENNON AND APPELLEES HAROLD SEIDER AND APPLE RECORDS, INC.

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Preliminary Statement

This joint brief* is submitted on behalf of defendants John Lennon ("Lennon"), Harold Seider ("Seider") and Apple Records, Inc. ("Apple") in opposition to the appeal by plaintiffs Big Seven Music Corp. ("Big Seven") and

* For purposes of continuity references to the Joint Appendix and exhibits will be as they are in appellants' briefs.

Adam VIII, Ltd. ("Adam VIII") and additional defendant on counterclaims Morris Levy ("Levy")* from a final judgment (A. 258a), entered August 10, 1976, in the United States District Court for the Southern District of New York (Judge Thomas P. Griesa) (the "Judgment"), and in support of Lennon's cross-appeal from so much of the final judgment as awarded Big Seven damages of $6,795 against Lennon. Apple is joining in this brief only to the extent of the Judgment's dismissal of plaintiffs' affirmative claims and the granting of a permanent injunction against Big Seven, Adam VIII and Levy.

Issues Presented for Review

1. Was the finding of the District Court that Big Seven and Adam VIII had failed to prove that on October 8, 1974 they entered into an enforceable oral agreement with Lennon and Apple giving them the right to produce and distribute an album of rock and roll songs recorded by Lennon, clearly erroneous?

2. Was the finding of the District Court that the unauthorized release of the "Roots" album by Levy and Adam VIII, in conscious and wilful derogation of Lennon's rights, proximately caused damage to Lennon, clearly erroneous?

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* Although plaintiffs and Levy are seeking reversal of the entire judgment they have, of course, despite their statements to the contrary at pages 2-3 of plaintiffs' brief, irrevocably surrendered their right to appeal from the Capitol Records, Inc. ("Capitol") and EMI Records Limited ("EMI") portions of the Judgment. The former controversy among Big Seven, Adam VIII, Levy, Capitol and EMI is, accordingly, moot. This Court is also without jurisdiction because plaintiffs and Levy have withdrawn their appeal as to Capitol and EMI, and it is as if they had *never* appealed as to those two parties and the portions of the Judgment which relate to them. Therefore, this Court cannot reverse the Judgment and remand for "a determination of plaintiffs' damages for defendants' breach of contract . . . [etc.]" or reverse the Judgment awarding defendants $419,800 in damages "in all respects". (Plaintiffs' Brief, p. 56)

3. Was the finding of the District Court that Lennon was entitled to damages in the amount of $145,300 by virtue of Levy's and Adam VIII's tortious conduct, clearly erroneous?

4. Did the District Court err in failing to find that Big Seven was estopped from claiming that Lennon had breached an in court settlement of an earlier case and in awarding any damages to Big Seven on that claim.*

Statement of the Case

The Nature of the Case

The first paragraph of "The Nature of the Case" is illustrative of a pattern of misstatement and distortion of the record which permeates plaintiffs' brief, as well as Levy's. Plaintiffs are either unaware of the nature of their own claims or have deliberately omitted the fact of dismissal of certain claims. In the robing room immediately prior to commencement of trial,** on their motion, the Court dismissed plaintiffs' claims for (a) violation of Section 2 of the Sherman Act, 15 U.S.C. §2, (b) predatory price cutting (¶¶35(C) of Count I and 60(C) of Count VII of the amended complaint) and (c) damage to reputation and good will (alleged in Counts V and VIII of the amended complaint).

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* On his cross-appeal Lennon is not contesting the amount of the damages ($6,795) awarded to Big Seven on this claim. The sole basis for Lennon's cross-appeal is that Big Seven is estopped from asserting this claim at all.

** The first trial of this action commenced before Judge Lloyd F. MacMahon and a jury on January 12, 1976. On motion of the defendants a mistrial was declared the next day and Judge MacMahon recused himself at the plaintiffs' request (*See* Transcript of January 13, 1976, pp. 156-62, which pursuant to a motion by plaintiffs was, along with the remainder of the record before Judge MacMahon, admitted into evidence at the trial below and deemed to be a part of the record herein (A. 2216)). Judge Thomas P. Griesa was then assigned to the case by Chief Judge David N. Edelstein. The parties agreed to waive a trial by jury and the trial began again on January 14, 1976 (A. 3-4).

Big Seven and Adam VIII also have misstated (by the reference to a "fraud" claim) the nature of the defendants' counterclaims, apparently in an effort to bootstrap themselves into an argument that the standard for the punitive damage award should be the standard applied in fraud cases under New York law. The only defendant to assert a counterclaim for fraud was Apple* (A. 90a-92a) and Apple virtually abandoned that claim (A. 2344a16, 17 and 22).

The District Court Decisions

The case below was tried in three phases over 22 actual trial days. The basic theme of plaintiffs' and Levy's appeal is that virtually every determination made by the District Court was in error. Simply stated plaintiffs and Levy want this Court to retry the entire case below on a joint appendix in excess of 5,000 pages, substitute its judgment for the trier of fact who conducted the trial, and reverse

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* Nowhere in his opinion of April 8, 1976, on defendants' counterclaims did Judge Griesa mention Apple's fraud claim (A. 3458-85) and he clearly did not award punitive damages on a fraud claim (A. 3474-75).

The claim made in Levy's brief (pp. 18-19) that Lennon was awarded damages "he did not even demand" is unfounded. The damage claims of Lennon, Apple, Capitol and EMI were discussed in detail at a February 27, 1976 hearing. The record is clear that because of the contractual relationships between EMI-Apple-Capitol (DX B-1, C-2 and D at E 207, 223 and 272, respectively) Apple was in an "intermediary relationship" and "Capitol had to remit, I suppose to Apple, which in turn would pay Lennon . . . any damages awarded on account of loss of records sales." (A. 2344a36-37) As the Court noted that day "on one theory or another Lennon, Capitol, Apple and EMI, there is a violation of their rights by taking these tapes and making records and purporting to issue them . . . [and] all four defendants are seeking whatever monetary relief is appropriate to their situation." (A. 2344a33-34) Adam VIII and Levy were clearly on notice that Lennon's claim for lost royalties was to flow from Capitol through Apple to Lennon (*See* A. 2344a 19, 37, 66-67; *see also* 3066-67). Furthermore, there was no objection by Adam VIII or Levy when evidence was introduced on Lennon's behalf to support the damage award made to him (A. 3073) or during final argument (A. 3368-69, 3370, 3401-05). Finally, and most telling, Adam VIII and Levy did not raise this point on their motion to amend the findings of fact and conclusions of law.

virtually every finding of fact upon which the Judgment was based.

The first phase, tried over 12 days in January 1976, was limited to the question of whether plaintiffs, through Levy, had entered into an oral agreement with Lennon and Apple on October 8, 1974, giving plaintiffs "the right to distribute through television advertising a record album of rock and roll songs recorded by Lennon". (A. 156a) The District Court analyzed the evidence in a 28 page opinion dated February 20, 1976, and made the following findings, *inter alia:*

> "The fact that Levy and plaintiffs have experienced such difficulty in formulating the terms of the contract for presentation to the court is sufficient in itself to cast doubt on whether there was ever a contract at all. Moreover, the testimony about the October 8 meeting does not show by anything approaching a preponderance of the evidence that an agreement was made for Levy to have United States mail order distribution rights for Lennon's rock and roll album. (A. 168a)
>
> "I conclude, on the basis of the evidence about the October 8, 1974 meeting and on the basis of all the other relevant evidence, that no contract was entered into by Lennon or Apple granting Levy or one of his companies the right to produce and distribute Lennon's rock and roll album." (A. 178a-79a)

Plaintiffs do not contest on this appeal the Court's findings that their "sole reliance is upon an alleged oral agreement," that "neither the alleged contract nor any terms thereof were ever reduced to writing," and that they "rely solely on . . . [the October 8] meeting as being the occasion when the alleged contract was created". (A. 164a-65a) In light of its findings, the District Court found it "unnecessary to discuss the Statute of Frauds issue raised by defendants". (A. 179a)*

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* Defendants raised two Statute of Frauds defenses—the oral agreement was barred because it was (a) not to be performed within one year and (b) an executory accord and not a novation.

The defendants' counterclaims were tried over 6 days in March and April 1976 and resulted in a decision which was read from the bench on April 8, 1976.* The District Court dictated a 24 page decision into the record (A. 3458-85) which awarded compensatory and punitive damages to Capitol, EMI and Lennon of $429,200, $154,700 of which was awarded to Lennon as follows: $109,700 for lost royalties (later reduced by stipulation by $9,400 to $100,300), $35,000 for violation of §51 of the New York Civil Rights Law and $10,000 in punitive damages. The District Court made *inter alia*, the following findings:

> "In my view, the issuance of the Roots album by Levy did constitute a wilful act in conscious and wilful derogation of the rights of Capitol, EMI and Lennon.
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> • • • • •
>
> "Levy had absolutely no basis for believing that he had the legal ability to issue this album, and I cannot in all realism believe that he even thought that he had such right." (A. 3474)

The October 1973 Settlement Agreement claim was tried over 4 days in April 1976 and was decided by a 26 page opinion dated July 13, 1976. Plaintiffs on their breach of contract claim had asserted that the October 1973 Settlement Agreement had been replaced by the October 8, 1974 oral agreement. Since the District Court found in its February 20th opinion that no contract was entered into on October 8th Big Seven moved on February 27, 1976, to amend the amended complaint to assert a claim against

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New York General Obligations §§5-701(1) and 15-501(1) and (2). (Set forth in Addendum) It is presumptuous of plaintiffs to request a remand for determination of damages in their favor without findings on these defenses.

* Levy's claim (Levy Brief, p. 37) that the "trial judge suddenly ordered oral summations" is not supported by the record. On April 7th the District Court inquired whether counsel wanted to have final argument on the counterclaims "tomorrow" and counsel for plaintiffs and Levy responded that he was "prepared to argue tomorrow." (A. 3348)

Lennon for breach of the October 1973 Settlement Agreement. The District Court awarded Big Seven damages of $6,795 and refused to grant specific performance of a portion of the Agreement.

Counterstatement of the Facts

The October 1973 Settlement Agreement

In 1973, an action by Big Seven for copyright infringement against Apple and others was pending in the District Court. In September-October 1973, Lennon was in Los Angeles planning with Phil Spector ("Spector"), a successful producer of rock and roll phonograph records, the recording by Lennon of a group of "oldies" (rock and roll songs popular in the 1950's) (A. 690-91). When Lennon was told that he had to be in New York for the "Come Together" action he told his lawyers to " 'make a deal' ". (A. 692)

On October 15, 1973, the action was settled and dismissed with prejudice (PX 11 at E 13; *see also* A. 1121). The terms of the settlement basically were that Lennon, although not a party to the action, on his "next album", which the parties anticipated would be the Lennon-Spector "oldies" album (A. 775, 784, 816, 817, 1121, 4011-14, 4039-41; *see* July 13, 1976 Opinion at A. 193a-95a), would perform three songs, the copyrights to which were owned by Big Seven. Lennon agreed to perform "You Can't Catch Me", "Angel Baby" and "Ya Ya", although he could substitute two other Big Seven songs for "Angel Baby" and "Ya Ya" (PX 11 at E 13 and PX 12 at E 19). Lennon was also, prior to December 31, 1974, to use his "best efforts" * (A. 781, 1121-22) to cause Apple Records, Inc., a California subsidiary of Apple's parent, to license to Big Seven three master recordings from the non-Beatle catalogue of songs, or in the alternative, to record two additional songs owned by Big Seven.

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* Plaintiffs substitute the words "would cause" for the words "best efforts" (Plaintiffs' Brief, p. 7), a substitution which improperly distorts Lennon's obligation under the agreement.

Lennon's Problems Completing the "Oldies" Album

In mid-December 1973, the Lennon-Spector recording sessions ceased and Spector disappeared with the tapes of all the songs recorded by Lennon (the "Spector Tapes") (A. 630, 694-95, 716, 783).

In early July 1974, Capitol retrieved the Spector Tapes after paying Spector's recording costs of approximately $90,000 (A. 113, 697). Capitol delivered 30 boxes of Spector Tapes to Lennon when Lennon was about to begin recording an album of his own compositions titled "Walls and Bridges" and since Lennon had already made the final arrangements to commence recording that album (*i.e.*, hired musicians, reserved studio time, etc.) he decided not to cancel those plans but to put the Spector Tapes aside until he had finished "Walls and Bridges" (A. 696-97, 784, 1907). It was this decision which set in motion the chain of events resulting in the commencement of the instant action. In September 1974, "Walls and Bridges" was released and in early October Lennon began working on the Spector Tapes again (A. 698). Upon release of "Walls and Bridges" Levy told Seider that Lennon had breached the October 1973 Settlement Agreement, and when Seider began explaining the problems with Spector, Levy demanded to sit down with Lennon face to face to discuss it. Seider, while not agreeing that there was a breach, was able to arrange such a meeting shortly after Lennon began working on the Spector Tapes (A. 1123-24).

The Participants in the Cavallero Meeting

On October 8, 1974, Lennon, Seider, May Pang (a former employee of Lennon), and Bernard Brown ("Brown", an employee until May 31, 1975 of Apple Corps Ltd., Apple's parent company) (A. 481), had dinner at the Benihana Restaurant on West 56th Street in New York City (A. 489, 703, 1125). Lennon, Seider and May Pang had been invited to dinner at Levy's club but Lennon preferred to eat prior to going to meet Levy (A. 486). Since Brown was

in New York on business, Lennon invited him to join them for dinner (A. 489). Following dinner Lennon, Seider, May Pang and Brown went to the Club Cavallero (A. 489, 704-05, 1125) on East 60th Street so that Lennon could meet with Levy and explain to Levy what had happened to the Spector Tapes and why Lennon's "oldies" album containing the three Big Seven songs had been delayed (the "Cavallero Meeting") (A. 486-87, 700-01, 1124).

At pages 8-9 of their brief plaintiffs address the question of Brown's attendance at the October 8th meeting and conclude that he "was either lying or had a very poor memory." The simple truth is that Brown mistakenly testified that he flew from Los Angeles on October 8th. However, Brown did testify that he came to New York from Los Angeles with Seider (A. 485 and 526), and Seider testified that he "came to New York on October 7th" (A. 1966), and that he arranged with Levy the morning he left California for New York to meet with him the next day, October 8th (A. 1124).

Plaintiffs point to two pages of Levy's and Kahl's* testimony ("Kahl", a vice-president of Big Seven) (A. 437 and 1301), to support their contention that Brown was not present on October 8th. They neglect to mention A. 430-39 and 1303, wherein Levy and Kahl, in effect, recanted this testimony.

Obviously the District Court, after observing Brown and hearing the testimony of Lennon, Seider and May Pang

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* Kahl's testimony was generally suspect and conflicted with Levy's on several major points. For example, Levy testified that nothing was said on October 8th about "putting the agreement in writing" (A. 177) and on his deposition he testified that he did not feel that the deal he felt he had just reached on October 8th "would be reduced to writing at a subsequent date." (A. 1662) Kahl, however, soared into a flight of fancy on this point and not only directly contradicted Levy but contradicted his own deposition testimony. Kahl testified at trial that Levy said to Seider on October 8th: "'Let's get together on this and get it down into . . . writing,' and Harold said, 'We will get to that later, don't worry, Morris'." (A. 1402-03) On his deposition Kahl testified that he could not recall any discussion about putting the deal in writing *(Id.)*.

chose to believe Brown (A. 706, 1127-30 and 1438; *see also*, DX HHHH at E 492 and DX CA at E 318).

Lennon's Contractual Commitments

Plaintiffs conceded at trial that EMI, at the time of the Cavallero Meeting, "had the exclusive rights to distribute Lennon's records [via regular retail sales, mail order sales, record clubs and retail fulfillment centers] outside North America . . . [and] that Capitol had the exclusive rights to distribute Lennon's records through retail channels in North America (including retail fulfillment centers) and that the only possible distribution rights reserved to Lennon or Apple were those relating to mail order distribution in North America". (A. 167a-68a)

Lennon and Seider entered the Cavallero Meeting with the clear understanding that Lennon was under exclusive contract to EMI and that Lennon could not record for anyone else for sales in the United States or elsewhere via mail order, retail fulfillment centers or any other merchandising method without an express waiver from EMI and Capitol (A. 634-35, 1119, 1135, 2013-17). As Lennon testified: "As far as I understand, they own everything I do, even if I speak". (A. 635) Levy was told at the Cavallero Meeting that EMI "had all the rights to John Lennon's recordings and that the permission of EMI would have to be obtained" (A. 1135) before a deal with him could be consummated. Levy was also advised that Capitol's permission was needed before any agreement with him could be entered into (A. 1139-40, 2049-50).

Plaintiffs place great reliance on their contention that "there was an exclusion for mail order rights in the Capitol-Apple contract so that EMI's consent was not necessary in order for Apple and Lennon to grant United States mail order rights to Levy" and spend pages (Plaintiffs' Brief, pp. 14-15 and 38-41) attempting, and failing, to estab-

lish something that did not have any bearing on the District Court's decision.

The District Court spent five pages discussing the EMI-Apple-Capitol agreements that governed ownership of the Beatles' and Lennon's recordings and concluded that "when Lennon entered the meeting of October 8, 1974, he did not do so as a free agent." (A. 164a) At the February 27, 1976 hearing Judge Greisa stated: "What I held is that regardless of *any* interpretation [of the EMI-Apple-Capitol agreements], there was no contract, and therefore there wasn't even the grant of mail order rights, *even if Apple had it to grant* . . ." (A. 2344a66-67) (emphasis added) No representative of Capitol or EMI was present at the Cavallero Meeting nor were the EMI-Apple-Capitol agreements available that night. In fact Levy did not ask to see, attempt to secure, or instruct his lawyers to secure, copies of those agreements until *after* he released his version of the Lennon "oldies" album and *after* he sued the defendants (A. 547-48, 550).

Instead Levy relied on what he had been told in 1973 by Allen Klein ("Klein"), the ex-manager of three of the Beatles who was engaged in extensive litigation with the Beatles both in New York and England (A. 1554-55, 1592) —that the Beatles had mail order rights in the United States (A. 167-68)—and, of all things, an interview of Klein in "Playboy" magazine* (A. 1673). The idea that Levy would be advising Lennon, who had been under exclusive contract to EMI since 1962 (A. 634), and Seider, an attorney who had assisted in the negotiation and drafting of the EMI-Apple-Capitol agreements in 1969 (A. 1077, 1181, 1982-83), as to Lennon's rights under the agreements is ludicrous —a conclusion the District Court obviously reached.

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* Levy's reliance on the Playboy article makes no sense whatsoever because it states "we got them total control and ownership of their product in America" (A. 171a), a contradiction of what Klein told Levy.

The Cavallero Meeting

The Cavallero Meeting, which lasted approximately two hours (A. 1131), began with Lennon explaining what had happened to the Spector Tapes, the efforts to retrieve them from Spector, why his "next album" was not the "oldies" album containing the three songs owned by Big Seven, how he had started planning for "Walls and Bridges" because he was tired of waiting for the Spector Tapes, and the final return of the Spector Tapes (A. 497, 706-07, 1126, 1438-39).

Levy indicated that he was "out of pocket" $250,000 as a result of the delay in the "oldies" album (A. 707-09). Big Seven's proof on the trial of the October 1973 Settlement Agreement claim showed that its damages were only $6,795 for the failure of Lennon to record one song, two Big Seven songs actually having appeared on the "oldies" album when it was released by Capitol in February 1975. Therefore, Big Seven's damages as of October 1974 were the value of the delay in not receiving approximately $21,000 in royalties had the "oldies" album been released in September 1974 instead of February 1975 —not "[m]any hundreds of thousands of dollars." (A. 116)

Seider indicated to Levy that the cost to Capitol of obtaining the Spector Tapes was in excess of $90,000 and that they were then in an incomplete state (A. 1769). Lennon outlined his efforts to salvage six of the tracks on the Spector Tapes and stated that he was looking for a way to utilize the tapes without going back into the studio and thinking of the best way of merchandising the tapes, and had thought of putting out an EP (extended play) record* (A. 497, 707-09, 1132, 1492, 2003, 2004). Levy and Seider said that EPs were not sold in the United States (A. 1152). Lennon also said that he thought that the salvageable Spector Tapes might be a good product for television because you would "avoid the critics" and that he was going to talk

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* An EP is a 45 r.p.m. record containing two or three songs on each side.

to the people at Capitol about this (A. 498, 710, 1132, 1439, 1440, 1498, 2004, 2006). By the time of the Cavallero Meeting Lennon had not lost his enthusiasm for, or interest in, the "oldies" album nor was he "disgusted" with the project. He was tired from overwork and was afraid that it was a little late for an "oldies" package (A. 1911-12, 2004-05). Levy stated that he put out television packages, *i.e.*, selling records and tapes through television promotion, and that he would like to sell the album on television (A. 498, 710, 1133).

Lennon, who had previously thought of the idea of selling the album on television and had even thought of a commercial for the album, said they would have to ask EMI, and asked Seider if that was possible (A. 499, 535, 711, 719, 1133, 1914, PX 85 at E 90). Seider said that while it was a possibility "it was doubtful" but in any event the consent of EMI was necessary since Lennon was signed to EMI exclusively (A. 1133, 1135, 1138, 2049, 2050). Seider also explained that Lennon's recordings were released in the United States on the Apple label but were distributed by Capitol and if EMI did not consent it did not make any difference what Capitol said because "EMI was the owner of the exclusive rights to John's recordings". (A. 1139-40, 1440, 1487, 2013-17, 2129) During the discussion of EMI's rights there was no differentiation between mail order rights and other rights, or between United States rights and European rights (A. 1139). Levy asked Seider when he would be going to England to see Len Wood of EMI, who would be the person to talk to about EMI's consent (A. 502, 1133, 1440, PX 85 at E 90). During the course of the meeting Levy explained how television campaigns worked and that the mail order sales were part of an integrated campaign which included sales in retail fulfillment centers following the mail orders (A. 137, 139-40, 151, 153-57, 498, 502, 534, PX 85 at E 90). The parties then began discussing the number of songs on television packages and Levy mentioned that they usually have 20 songs on an album. Lennon

said that 20 songs was too many because the sound quality would be bad but by reducing the length of each song you might be able to get 15 or 16 songs on an album. The important thing to Lennon is that the amount of time on each side of an album be kept to 20 minutes or below because compressing over 20 minutes of music on a side causes the quality of the sound to diminish rapidly (A. 641-42, 1133-34, 1914-15, 2011-12). Lennon, Levy, Kahl and May Pang then began mentioning the names of old tunes that might be good for the album (A. 532), and Lennon invited Levy to come to the Record Plant, a recording studio, the next day to listen to the Spector Tapes, and Levy did so (A. 538, 716, 1441).

More than once, Levy asked Seider when he was going to go to England to secure EMI's permission, and Seider replied that it was premature and that the album should be finished first (A. 505, 1135, 1138). Seider indicated to Levy his hope that EMI might agree to let the album be sold on television since Lennon's contract with EMI was going to expire in January 1976 (A. 2037). There was no discussion of the October 1973 Settlement Agreement during the Cavallero Meeting (A. 1138) and there is no great mystery as to why there was not. Once Levy realized there was a possibility of obtaining the rights to sell a Lennon album on television he was no longer interested in discussing why he had not received a statutory royalty (called a "mechanical royalty") of 2 cents per song for three songs Lennon was supposed to record. According to Lennon, Seider and May Pang, there was also no discussion during the meeting of Lennon's royalty (A. 1136-37, 1440-41, 1917). In fact Lennon testified that his royalty is set by his EMI contract and that if Capitol and EMI had been agreeable to allowing Levy to sell the album on television he presumed that EMI would be paying his royalty, not Levy (A. 1916-18). As they were leaving the Club Cavallero, Brown testified that Levy said to Lennon, "'Well, let's hope we can do something John'." (A. 307)

Plaintiffs' Failure to Prove the Oral Agreement

The evidence shows that the discussions at the Cavallero Meeting did not reach the point where an agreement was reached giving Levy the right to distribute Lennon's "oldies" record (*see* A. 997-99, PX 85 at E 90). The District Court, using a very minimum standard as to the terms that were necessary to a finding that Lennon and Levy had entered into a contract, reached the conclusion "that no contract was entered into by Lennon or Apple granting Levy or one of his companies the right to produce and distribute Lennon's rock and roll album". (A. 179a) Neither Lennon nor Seider indicated that Lennon agreed to allow Levy to sell the album and there was clearly no agreement on what Lennon's royalty would be should Lennon so agree. There is no question that Lennon was interested in merchandising the "oldies" album on television, and if possible through Levy, but the final decision depended upon whether this "suited" Capitol and EMI (A. 1916, 2013), and whether a satisfactory agreement involving all the relevant terms (*e.g.*, royalties) could be worked out.

The most crucial finding made by the District Court was that Lennon did not grant Levy or one of his companies the right to distribute Lennon's "oldies" album. The Court reached this conclusion for a number of reasons one of which Judge Griesa charitably characterized as plaintiffs' "difficulty in formulating the terms of the contract for presentation to the court" which he found was "sufficient in itself to cast doubt on whether there was ever a contract at all." (A. 168a) The "difficulty" to which Judge Griesa was referring began when Big Seven and Adam VIII initially commenced their action for breach of an oral contract in New York State Supreme Court. The complaint in that action (DX CO at E 335-36), dated February 19, 1975, alleged, *inter alia*, that:

> "In or about October 1974, Lennon, individually and on behalf of Apple, agreed that the October 1973 settle-

> ment would be modified to provide that Lennon would record approximately 15 rock and roll songs, including several songs previously recorded under the production of one Phil Spector, *which would be sold as a record and tape under the title 'Roots' . . . by Big Seven or its assignee on a world-wide basis, through mail orders and retail fulfillment centers, by means of television merchandising. . . .*" (¶12) (emphasis added)

This claim by Levy of "world-wide" rights for mail order and retail fulfillment sales, not merely mail order in the United States, preceded the commencement of the State court action, and was first enunciated in a letter Levy sent to David Dolgenos, Lennon's attorney, dated January 9, 1975 (PX 31 at E 30). In their original complaint in the District Court, filed March 6, 1975, plaintiffs again made the allegation quoted above (DX CR at E 380).

When plaintiffs served a Bill of Particulars in the State court action, dated May 30, 1975 (DX AR at E 285-86), in paragraph 1(vi) thereof they set forth what they claimed were "the exact and complete terms and conditions" of the alleged oral contract and in so doing merely reiterated verbatim the allegations of paragraph 12 of the State complaint. Thereafter, on June 2, 1975, Levy swore under oath at his deposition that he had read and approved both the State complaint and the Bill of Particulars. Levy reluctantly confirmed this fact during the trial when questioned on the subject by the Court (A. 1784-91). Levy also confirmed on his deposition that the agreement being sued upon was the one set forth in paragraph 12 of the State court complaint (DX CM-1, redlined portions on pages 187-88*). On August 11, 1975, two months following his deposition, Levy, in an affidavit submitted to the State court (DX AV at E 309), swore to the truth of the basic language of paragraph 12, and in September 1975, he

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* The portions of the Levy and Kahl depositions underlined in blue were admitted on behalf of plaintiffs and in red on behalf of defendants (A. 2191).

signed and swore to the answers to Apple's First Set of Interrogatories (in response to Interrogatory 37), wherein paragraph 12 was virtually copied again in response to a request to describe "in full detail the agreement". (DX AS-1 at E 299-300)

When plaintiffs served and filed their amended complaint herein in October 1975, no indication was given that the alleged oral contract being sued upon was for anything less than "world-wide" rights to sell the album through mail orders and retail fulfillment centers by means of television advertising. Indeed, in paragraph 13 of the amended federal complaint paragraph 12 of the State complaint was again copied (A. 12a). Plaintiffs' Statement of Disputed and Undisputed Facts (DX CQ at E 367-68) served and filed in November 1975, just prior to trial, reflected plaintiffs' continued insistence that "the sale of the Roots album would be on a worldwide basis through mail orders and sale [*sic*] fulfillment centers". Finally, at page 7 of their Pre-Trial Memorandum filed on November 11, 1975 (A. 5a), plaintiffs again stated that the claim being sued upon was for the right to sell "world-wide through mail orders and retail fulfillment centers, by means of television advertising." It would not be unreasonable to expect that Big Seven and Adam VIII would stick to this claim at trial.

However, a review of Levy's direct testimony about the Cavallero Meeting (A. 128-78) reveals that there was not even a discussion, much less an agreement, about Levy being given "world-wide" rights to sell via mail orders and retail fulfillment centers. Plaintiffs apparently realized sometime prior to trial that they were presented with a serious problem of proof for during his opening statement their counsel outlined an oral agreement quite different from the one upon which plaintiffs' claims had been predicated for almost one year. The oral agreement outlined was for mail order sales in the United States only, with retail fulfillment center and foreign sales being "left open" subject to Seider checking with EMI (A. 28-30). However,

neither in Levy's direct testimony nor on his deposition did he testify that such an agreement was made at the Cavallero Meeting. (*See* A. 150, 167-77). Contrary to the assertion in the footnote on page 25 of plaintiffs' brief, Levy did not explain on his deposition that the claim was limited to mail orders only and plaintiffs' transcript reference does not support that statement. Levy actually confirmed quite specifically the allegations of paragraph 12 of the complaint which set forth the "world-wide" agreement being sued upon. Levy, after reading paragraphs 12, 13 and 14 of the State complaint, was asked whether those paragraphs related to the Cavallero Meeting or later meetings and gave the following testimony:

> "A I would say the bulk of it was settled on October 7 [meaning the Cavallero Meeting].
>
> Q Did you see anything offhand that might be settled later?
>
> A No, not really, no." (DX CM-1, redlined portions on pages 187-88).

Plaintiffs' Unsupported Contentions

Beginning at the bottom of page 24 plaintiffs make a series of statements which are not supported by the record. First, they say that Levy "testified that in November 1974 Seider told him that it was unnecessary to see EMI in England," citing "A. 293, 294."* Those pages simply do not support that statement, and Levy did not so testify. However, Levy did testify immediately prior thereto that in a telephone converation with Seider "sometime in November" Seider said that they could go ahead in the United States and on retail fulfillment centers because "no permission was needed from anybody," but that he (Seider) "still had to get clearance [from EMI] on the foreign rights." (A. 289-91) So much for the contention that

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* The same assertion is made in the footnote on page 25 and again on page 43.

Levy testified that Seider said "it was unnecessary to see EMI." (Seider, of course, denied that he ever told Levy that EMI's permission was not necessary for mail order and retail fulfillment center sales in the United States (A. 1195-96, 1199, 1201, 1214, 1218-20, 1229-30, 2061, 2069-71, 2129, 2130).

Levy then testified that he next spoke to Seider in Florida in December (A. 291). Contrary to the statement on page 26 of plaintiffs' brief Levy did not testify that Seider told him in Florida "there were no problems and that the deal was all set." Again the transcript citation (A. 293) belies the statement made in the brief. Seider testified, without contradiction, that on December 29, 1974 in Florida, Levy had asked him when he was going to speak to Len Wood of EMI about securing its permission and that he had expressed to Levy pessimism about securing EMI's permission (A. 1229-30). During his redirect Levy admitted that Seider told him he was going to speak to EMI* (A. 1831). Plaintiffs argue that Levy "thereupon *assumed* he was also getting retail fulfillment center and foreign rights" but when "it later developed during the trial that Seider had not in fact obtained EMI's and Capitol's consent for retail fulfillment center and foreign rights" they "limited their claim to United States mail order rights." (emphasis added)

This argument is preposterous and is directly contradicted by the record. Plaintiffs knew in January-February 1975, before this action was commenced, that Levy was not getting "retail fulfillment center and foreign rights" (or any other rights) and it was not something that "developed during the trial." Levy testified that Seider told him on January 30, 1975, that Capitol was releasing the album itself and that Levy would not be given permission to distribute the album (A. 323), and that in February 1975 he

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* Plaintiffs' counsel tried to correct the admission and was admonished by the Court for leading the witness (A. 1831).

was not going to sell through retail fulfillment centers and that he was by then not relying on any representation made to him by Seider (A. 1781). Levy reluctantly confirmed that Allen Klein had told him in January or February 1975 that Apple did *not* have any rights outside of the United States except "'maybe Canada'" and "'certainly not for retail outlets, retail fulfillment centers.'" (A. 1550-51) Klein confirmed that he had told Levy in January or February 1975 that Apple had no rights for retail fulfillment or foreign sales (A. 1632-33), and Levy, when questioned by the Court, reiterated that he had been so advised by Klein (A. 1780-81). Clearly, plaintiffs knew before they even commenced the State court action that Seider had not secured EMI's and Capitol's consent. Plaintiffs had actually "limited their claim to United States mail order rights" during their counsel's opening but nobody noticed it at the time.

However, everyone soon realized that plaintiffs were no longer suing on a "world-wide" agreement for immediately following Klein's testimony referred to above (A. 1632-33) the Court asked plaintiffs' counsel "what the plaintiffs claim was the contract which was made. What was it?" (A. 1647) This question came *after* Levy's direct testimony and brief cross-examination and the presentation of all of plaintiffs' direct case on the breach of contract issue, Klein being plaintiffs' final witness. Plaintiffs' counsel then proceeded to outline the claim which in no way resembled the "world-wide through mail orders and retail fulfillment centers" agreement articulated by plaintiffs in one letter, three complaints (Levy having sworn on his deposition to the accuracy of the "world-wide" allegation), and five other documents filed in court, two of which were sworn to by Levy. He stated:

> "The agreement was that Mr. Levy's company would promote these records over television by mail order in the United States . . . [and] if EMI consent could be obtained then they would also distribute it. Mr. Levy's company would distribute it, through retail fulfillment

> centers and/or abroad. That was the agreement on that point." (A. 1649)

As we have already pointed out, the record was then devoid of evidence to support even this narrow claim. The District Court then questioned whether the parties would really make "a firm contract" the night of October 8th for mail order when they did not know about retail fulfillment centers and foreign rights (A. 1653). As the Court said, it was "puzzled about the absence of any resolution about the retail fulfillment or the foreign rights, particularly the retail fulfillment" and requested that plaintiffs' counsel submit the next day a memo listing the transcript references to the October 8th meeting and to all conversations about getting EMI's permission and "who had the rights." (A. 1655, 1656-57) Plaintiffs' counsel did not submit the memo requested by the Court (A. 1664), probably because a review of Levy's direct testimony revealed the failure to prove the claim limited to mail order sales in the United States.

Defendants continued with the cross-examination of Levy. When asked whether plaintiffs were suing "for violation of your world-wide rights" Levy responded: "I really don't know what the complaint said, Mr. Prettyman." (A. 1781) Three pages later the Court began questioning Levy about this statement (A. 1784) and the nature of the claim being asserted by plaintiffs. After agreeing that he had approved the complaint filed in State court (A. 1785), the Court asked Levy "what the agreement consisted of"—was it on a "world-wide" basis or, as articulated by plaintiffs' counsel at A. 1649, an agreement limited to United States mail orders? (A. 1786-87) For the first time throughout pre-trial discovery, the trial before Judge MacMahon and his direct testimony before Judge Griesa, Levy testified that the agreement was for mail orders in the United States only, parroting the language used by his attorney the day before (A. 1787). When

the Court then asked Levy why he approved the various complaints and court documents which asserted claims for "world-wide" rights to sell through mail orders and retail fulfillment centers Levy claimed that he had not in fact read the complaints, a claim which was quickly disproved (A. 1788-91).

Plaintiffs, however, were still unclear as to the nature of their claim for shortly thereafter plaintiffs' counsel hedged when in response to a query by the Court that "I did not understand you now to contend that Mr. Levy had rights to market outside the United States," he stated: "We contend, your Honor, that it is still not clear at this point. As soon as I get a chance and read the record I will clarify it." (A. 1805) This bit of back tracking required the Court to ask Levy (who was still being cross-examined): "Mr. Levy, when you came out with this album in February, did you believe that you had the right to market it outside, let's say, North America or outside the United States?" Levy responded: "No, based on what Allen Klein told me and other things, no." (A. 1805)

In spite of all this conflicting testimony plaintiffs contend that Levy's January 9, 1975 letter (in which they did not assert what they truly thought was their claim), upon which they place such great reliance and which they claim was never answered,* and their pleadings merely "asserted his maximum claim of world-wide rights" (Plaintiffs' Brief, p. 43). However, on redirect when plaintiffs' counsel was trying to straighten out the many inconsistencies in Levy's testimony there was a colloquy about the January 9th letter, the Court observing that there was a question about whether Levy wrote the letter "contrary to what he under-

* Seider testified, without contradiction, that he told Levy in a telephone conversation on January 7, 1975 when Levy said he was going to write a letter claiming that he had an "agreement" with Lennon, that there was no agreement and that Levy could write any letter he wanted to (A. 1242, 1244, 2092). The letter was answered before it was even written.

stood." (A. 1831) Levy, when asked by the Court, "Did you believe that you had world-wide rights [when you wrote the letter]?", responded:

> "That I had them already so I could go and market another country?
> The Court: Yes, I mean that.
> The Witness: No". (A. 1832)

To sum up, Levy knew in January 1975 that Apple did not have either retail fulfillment center or foreign rights and that Seider had not obtained Capitol's or EMI's consent for those rights. In fact Levy was not relying on representations made by Seider but what he was told by Klein (A. 1673), and he testified that had Klein told him in February 1975 that Apple did not have mail order rights his lawyers would not have allowed him to release the album (A. 1900). The January 9th letter made a false claim contrary to Levy's understanding as did each of the documents set forth above filed herein and in the State court action.

Having switched theories plaintiffs were then unable to convince the District Court that Levy and Lennon entered into an oral agreement *limited* to mail order sales in the United States for a very simple reason—there was no evidence to support such a finding. Rather, as the Court did find, Levy had discussed an integrated proposal involving mail orders and retail fulfillment centers. Plaintiffs argue (pp. 41-43 of their brief) that the "district judge was clearly wrong" on the question of whether the parties at "the October 8 meeting singled out the United States mail order rights . . . [and that] even Levy's testimony fails to reveal . . . [a "specific discussion"] of this kind, and I find that no such discussion occurred". (A. 173a) Plaintiffs quote a long excerpt from Levy's testimony and conclude that "the trial judge simply overlooked Levy's crucial testimony on this point, although plaintiffs' counsel did call it to his attention during summation." (Plaintiffs' Brief, p. 43)

Plaintiffs are playing semantic games and ignoring parts of the record which refute this contention. The Levy "testimony" quoted was given not on his direct testimony but days later during redirect which, as we have previously pointed out, was tailored to fit the plaintiffs' "new" claim. When the District Court referred in its opinion to a "specific discussion" it obviously meant what Webster defines as "consideration of a question in open and usually informal debate" (Webster's New Collegiate Dictionary 1976 ed.)—*i.e.* that Lennon and/or Seider talked about this subject with Levy and specifically "agreed to forgo Levy's retail fulfillment center distribution and proceed only with mail order sales". (A. 173a) The record is devoid of evidence that Lennon or Seider agreed to this. In fact the Court questioned plaintiffs' counsel on this subject very closely (A. 2258-64) and he conceded (A. 2260 and 2262-63) that there was no testimony by Lennon and/or Seider to the effect that Lennon agreed to go forward with mail order sales only. Having had Levy's "testimony" pointed out to it at the conclusion of the final argument (A. 2342) the District Court still concluded that there was no testimony showing that Lennon and/or Seider agreed specifically to forgo retail fulfillment sales or foreign sales and proceed with mail order sales in the United States only.

Of course, the Court also found that "plaintiffs have not shown that there was any agreement on the amount or method of calculation of the royalty". (A. 174a)

Events Following the Cavallero Meeting

Plaintiffs introduced much testimony about statements made by Lennon and things done by Lennon after the Cavallero Meeting which they claim are admissions and circumstantial evidence that Lennon did enter into an oral agreement that night. However, the fact remains that since the evidence did not establish that an oral agreement was entered into by Lennon with Levy at the Cavallero

Meeting nothing said or done by Lennon after October 8th can correct that basic deficiency in plaintiffs' proof.

Lennon and May Pang had dinner at the Club Cavallero the following week. By that time Lennon had made arrangements to complete the "oldies" album during the week of October 21st and the musicians who would be performing with him on the album were scheduled to be in New York on October 18th to spend the weekend rehearsing. Levy invited Lennon to come to his farm in Ghent, New York when he heard that there was to be a rehearsal that weekend and invited Lennon to bring the musicians to the farm and rehearse there. Lennon initially refused; Levy persisted, and Lennon finally agreed (A. 1938-39). The weekend at the farm was not part of the oral agreement claimed by plaintiffs (A. 450-51).

The basic tracks completing the "oldies" album were recorded on October 21, 22 and 23 at the Record Plant and overdubbing of additional instruments was done between October 24th and 31st. Neither Levy, Kahl nor any other representative of plaintiffs was present during the October recording sessions or any other work done on the album. Nor did Big Seven or Adam VIII pay any portion of the recording cost (A. 1449, 1680-81). Pursuant to the EMI-Apple-Capitol contracts Capitol paid the costs for the October recording sessions, in addition to the cost of the Spector Tapes, and was reimbursed therefor by EMI (A. 697-98, 893, 1497, 1502, 2140).

In one conversation in October Levy told Seider that Klein had said that EMI's consent was not needed because of an exclusion in the Apple-Capitol contract, but Seider told him that Klein was wrong (A. 1193-94).* Levy asked

*On approximately November 22, 1974, Lennon happened to be in a building in which Klein had his office. Lennon dropped by Klein's office and was told by Klein that Levy was inquiring around about royalty rates from other copyright owners (including Klein) for the use of songs in the Lennon album. Lennon said that was premature and that he might be doing a deal with Levy (A. 929-30, 1583). Klein advised Lennon that he would not recommend a deal

Seider in conversations after that when he was going to speak to EMI about securing its consent (A. 1195-96), and Seider told him that such a request was premature until Lennon finished the album.

Levy kept asking for a tape of the album (A. 730), and finally in mid-November Lennon asked Levy whether he wanted a cassette or a 7½ ips (inches per second), and Levy said he wanted a 7½ so he could play it in his office (A. 732, 757). Lennon had the Record Plant deliver to [illegible] a 7½ tape for Levy to listen to (A. 1452). This type of tape is used for "reference purposes" and because of its poor quality is virtually never used as final master from which a record is made—15 ips tapes are used as the final master (A. 559-60, 614-15). At this point in time the album was not completed as far as Lennon was concerned (A. 1453).

The evidence demonstrates beyond a shadow of a doubt that Lennon had not finished the album when he gave Levy the 7½ ips tape and that he did not give the tape to Levy with the intention that Levy use it to manufacture a record. Aside from Lennon's testimony about giving the tape to Levy for listening purposes only (A. 732-33) there are several other facts which prove that the album was not finished in mid-November and that Levy knew it. Lennon testified that he never makes a final master from a 7½ ips but from a 15 ips (A. 677, 678, 682). Lennon intended from October 1973 to make a specific change in the final version of "You Can't Catch Me", a change he had not made when he gave the tape to Levy and which he did not make until the mastering session in early February 1975 (A. 734, 737, 738, 897-98, 902-05, 905). Lennon also

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with Levy and that in his opinion Capitol did not have record "club" (similar to book clubs) rights to Lennon recordings (A. 929-30). On that same day, Lennon asked Seider about Klein's statement, and Seider replied that Klein was wrong and if there had been such an exclusion Klein would have used it to his advantage when he was managing the Beatles (A. 931, 1194, 1973).

testified that he edited certain of the songs, entirely deleting two of poor artistic quality (A. 734, 738, 894-97). Lennon considers the final and most important part of the recording process to be the mastering session and the making of the lacquer masters. Until this process (which took two days for the rock and roll album, February 4-5, 1975) is completed the record is not finished as far as Lennon is concerned* (A. 738, 740-41, 745-49, 917-20, *see* DX TTT at E 478). Finally, Levy knew that he had not received the final version of the album because he did nothing toward producing a record from the 7½ ips tape after he received it in mid-November until *after* Seider told him on January 29 and 30, 1975 that Capitol wanted to release the album (A. 325-35, 707). On that day Levy told May Pang to tell Lennon that he was going to release the album and that Lennon could remix (edit) the tapes prior to manufacturing the record (A. 1482, 1525), further evidence that Levy knew the 7½ ips tape was not a finished tape, a fact plaintiffs now concede (see Plaintiffs' Brief, p. 30 and Levy Brief, p. 56).

On November 18, 1974, Seider, Levy and Michael Graham, an attorney formerly with Marshall, Bratter and then an associate professor at the University of Illinois Law School, met at the Club Cavallero in New York City (A. 770, 791, 1199). Levy asked Seider whether he had called EMI and while Seider said he had not, he agreed to get in touch with EMI if Lennon had finished recording (A. 793, 1200). Seider asked Levy what he was prepared to give EMI and whether Levy would do a joint venture with EMI. Levy said that he would not but that EMI could sell the album via mail order in the rest of the world while he would sell

* This fact was emphatically demonstrated during the counterclaim portion of the trial when after hearing the same song on "Roots" and "Rock 'n' Roll" the Court, upon being asked to do so by plaintiffs' counsel, observed: "I don't think there is any comparison. The Rock and Roll is so much clearer, the v[o]ice was very poor and indistinct on Roots, it was almost hidden there. . . ." (A. 3241-42)

it in the United States. Seider responded that since EMI owned all the rights to Lennon's recordings they could already do that and he asked Levy what he was prepared to give EMI (A. 1200-01). Levy explained how mail orders worked (A. 794, 1202-03). Seider asked Levy to "explain the numbers of the deal" (A. 796-97, 1203, 1205) and Levy starting jotting down the cost figures on retail fulfillment (A. 796-801, 1203-09). During that discussion Seider told Levy that Lennon's royalty was 12% (as we previously noted Lennon's royalty was not mentioned at the Cavallero Meeting) and that the recording costs on the album were $200,000 (A. 797, 1209, 1212). After totalling Levy's figures there was only 23 cents left from which would have to be paid Lennon's royalty (which should be 60 cents on a $4.98 album) and EMI's $200,000 in recording costs (A. 799-801, 1208, 1209, 1211-12, 1213). Levy had no real solution for this problem and again asked Seider to contact EMI (A. 801-02, 1214). Graham reconstructed the Levy figures following the meeting (A. 803-06, 1215-16, DX GGGG at E 491). The evidence showed that no agreement of any kind was reached at the meeting (A. 802, 1213-14).

The District Court found that the meeting "was exploratory only." (A. 175a) If on November 18th the parties were still having "exploratory" discussions the clear implication is that the earlier Cavallero Meeting had not resulted in a final agreement. Hence, the Court's finding of no contract based on "the evidence about the October 8, 1974 meeting and . . . all the other relevant evidence." (A. 178a)

When referring to this meeting plaintiffs again simply distort the record. They state at page 24 that "Graham claimed that the discussion involved mail order sales in the United States and was for the purpose of establishing the terms of a proposed contract for such sales," citing to Graham's testimony at "A. 796-801." A reading of those pages and a review of DX GGGG shows beyond question that Levy, Seider and Graham were discussing both retail

fulfillment sales and mail order sales at the meeting but that the cost figures set forth in Graham's notes related solely to retail fulfillment centers (A. 798, 805, 810, 1203, 1204, 1205, 1208). On his direct testimony and on cross-examination Levy simply did not tell the truth about the meeting. Under questioning by the Court Levy testified (during cross-examination) that the figures discussed at that meeting related to a European joint venture he said Seider had proposed (A. 1737-38). The proof that Levy was lying about the figures discussed was supplied by Levy's own deposition testimony which was read into the record (A. 1738-46). This testimony proved that there was *no* discussion of figures relating to a European joint venture, that the figures discussed were United States figures, and were, in Levy's own words, "basically" the deal reached at the Cavallero Meeting (A. 1744-46)—which as we all know plaintiffs claimed at trial for the first time related to United States sales only. Levy had two reasons for lying. First, testifying that the figures related only to a European joint venture fit with the "new" claim being advanced at trial and second, the notes made by Graham showed that the deal Levy was proposing would not work commercially. It was testimony like this which apparently caused the District Court to conclude that Levy's entire story was unworthy of belief.

Sometime after this meeting Seider talked to EMI's Len Wood ("Wood") and told Wood that he wanted to discuss the marketing of Lennon's album. Wood said that he was coming to America in December and that they could discuss it then, but Seider later heard from Malcolm Brown of EMI that Wood was not coming to the United States. Seider advised Levy of these calls and Levy asked whether a friend of his (Larry Uttal) who was going to England could speak to Wood. Seider said that it was not Mr. Uttal's place to talk to Wood (A. 1217-20, 2130). Seider later spoke to Rupert Perry, EMI's liaison man with Capitol in the United States, who said he had been asked by Wood to

speak to Seider about the marketing of Lennon's album. Seider said he was busy on a Beatles' settlement negotiation and would call him when he got back to California (A. 1221-23, 2085-86). Seider next spoke to Levy in Florida (A. 1223).* On December 29, 1974, Levy inquired of Seider as to whether EMI's permission had been obtained. Seider said he was pessimistic and Levy replied that he did not want to sue Lennon. Seider understood this reference to be to the October 1973 Settlement Agreement (A. 1229, 2070-71, 2104).

On December 31, 1974, David Dolgenos, of the Marshall, Bratter law firm, on instructions from Seider, wrote to Big Seven that in accordance with the October 1973 Settlement Agreement, Big Seven was free to select for licensing any three of seven listed non-Beatle masters owned by Apple Records Inc., the California subsidiary of Apple's parent (A. 1241, PX 30 at E 29).

Levy's January 9th Letter and the Events Thereafter

The events immediately preceding and following the release of the "Roots" album show that throughout the month of January 1975, Seider and Levy were in constant touch with each other, that Levy was advised of each meeting (both before and after) that Seider and Lennon had with Capitol, and that by January 15th Levy knew that Capitol wanted to sell the rock and roll album through normal commercial channels and was not interested in marketing the album on television through Levy or anyone else.

Levy returned to New York City from Florida on January 6, 7 or 8, 1975, read the letter sent by Dolgenos, and told Seider in a telephone conversation that he was going to send a letter saying: "'[W]e have an agreement.'"

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* On December 21, 1974, at Levy's invitation, Lennon, his son and May Pang went to Florida with Levy and his son to visit Walt Disney World (A. 934). While there, Lennon was joined on December 26th by Seider and spent some time with him going over contracts and other documents on a Beatles' settlement (A. 935-36).

Seider responded that "'we don't have an agreement'" but that he was not going to argue with Levy about it (A. 1242, 1244, 2092). Levy sent the letter on January 9th which asserted the "world-wide" claim for the first time (PX 31 at E 30). The same day Al Coury ("Coury") of Capitol met with Seider in California at the Brown Derby restaurant and Seider briefed Coury on the October 1973 Settlement Agreement and the discussions with Levy about selling the rock and roll album on television (A. 1246-47, 2093, 2096-97). Coury asked to hear a tape of the album and said that he was not enthusiastic about marketing a John Lennon album on television (A. 1247). (Seider had called Levy previously to tell him he was having lunch with Coury (A. 1246)). Coury said that he would arrange a meeting with Bhaskar Menon ("Menon"), the President of Capitol, to discuss the album (A. 1248). Seider's testimony with respect to his telephone conversations with Levy after January 6th or 7th stands uncontroverted by Levy.

On January 13, 1975, Dolgenos received Levy's January 9th letter (A. 2078, 2081; *see* PX 99 at E 97). Seider informed Levy by telephone of the Coury meeting on January 9th and told him that Coury wanted to hear the tape of the rock and roll album, to which Levy responded: "'Oh, oh, that is bad.'" Seider also told Levy that Coury was going to arrange a meeting with Menon to discuss the marketing of the album (A. 1248, 2107). On January 13 or 14, 1975, Dolgenos spoke with Seider (who was then in California) by telephone and told him about Levy's letter. Seider told Dolgenos that he would take care of it (A. 1245, 2089). On January 14, 1975, Seider met with Menon, Brown, Meggs and Coury and told them about Levy's and Lenon's desire to sell the album on television, but as he had not as yet received a copy of Levy's January 9th letter, he did not discuss it with them (A. 2082). Having heard the tape of the album, Capitol was very enthusiastic about it, thought it had great commercial possibilities, and wanted to release it. They rejected the idea of selling the album on

television and Seider advised them that they would have to "'convince'" Lennon that the album should be released through normal channels (A. 1249-52, 2106, 2108, 2135-37*).

On January 15, 1975, Seider told Levy about his meeting with Menon, Meggs and Coury and that representatives of Capitol were preparing a marketing program to demonstrate to Lennon that the album should be marketed in the normal way. Levy asked whether "'it would help if I called Bhasker [*sic*] Menon?'" and Seider responded "'I doubt it.'" Seider told Levy that the release of the album depended on whether Lennon believed that the album could be sold in the normal manner and that depended on the program Capitol presented to Lennon (A. 1253-54, 2107). Seider later told Levy that the Capitol people were coming to New York on January 28th "or thereabouts to meet with" Lennon (A. 1254). On January 20, 1975, Seider received a copy of Levy's January 9th letter to Dolgenos (A. 1245).

Lennon met with the Capitol personnel on January 28, 1975, in New York and Coury convinced Lennon that the album had great commercial possibilities, should be sold through normal commercial channels and that selling through television was not for an artist of Lennon's stature and would antagonize record dealers who had been selling Lennon's records for years. Lennon approved Capitol's marketing proposals (A. 1255-63, 1922). Although Lennon could not dictate to Capitol as to how the album should be sold, he had no obligation to give it to Capitol and could withhold it from them, Lennon having fulfilled his recording obligations under his agreements. However, if Lennon insisted on releasing the album through television merchandising, Capitol could refuse and there would be an "impasse" (A. 2111-14).

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* Plaintiffs' contention (pp. 27, 28, 36 and 47 of their brief) that Seider tried to persuade EMI and Capitol to release the album and "urged" Capitol to persuade Lennon to allow Capitol to do so, is an overstatement of the record.

On January 29, 1975, Seider telephoned Levy the first thing in the morning and told him of Capitol's decision to release the album through normal commercial channels and that Lennon was convinced at the meeting by Capitol's enthusiasm that the album could be marketed in that manner; Seider arranged a meeting among Levy, Coury and himself for that afternoon so that Coury could explain why the album should be released through normal channels (A. 1263-65, 2108-10).* Coury failed to show for the meeting and Seider cancelled it; Levy asked to see Seider the next day and Seider agreed to meet with him (A. 1266, 2114-15). Levy then telephoned Klein to check on the terms of the Apple-Capitol contract (A. 1629). On January 30, 1975, Menon learned from Klein that Levy was putting out his version of the Lennon album (A. 1277, 2540). Later that day Seider met with Levy at Levy's offices, told Levy that he could not put out the album but Levy stated "'I'm going to put it out, I got a shot, I got a shot'"; Levy then punctuated his threat by turning to his tape recorder and playing "You Can't Catch Me" from the 7½ ips tape given to him by Lennon in November (A. 1266-73). Levy then notified Lennon by telephone through May Pang that he was going to release the "Roots" album and that if Lennon wanted to edit the album he could do so (A. 1275). Lennon and Seider met that evening at Lennon's studio apartment (A. 1274-76) and spoke by telephone to Coury and Charles Tillinghast of Capitol concerning the Levy situation advising them that Levy was releasing the album. Coury advised them that Capitol knew this already, having heard about it from Klein (A. 1276-79). It was only after the meeting with Seider on January 30th that Levy began preparations to release the "Roots" album (A. 325-41).

Lennon, at Capitol's request went to the recording studio to do the final mixing of the album and make the lacquer

* Prior to this Klein had told Levy that Capitol was planning to put out Lennon's album (A. 1548-49).

master from which the actual albums would be pressed (A. 970, DX TTT at E 478-82). On February 7, 1975, Capitol sent a telegram to Levy advising him of EMI's exclusive rights to Lennon's recordings and putting Levy on notice that Capitol and EMI would hold Levy responsible for any damages incurred by reason of the advertisement or sale of a Lennon album (A. 35a). On that day the decision was made by Capitol to rush the release of the Lennon album (A. 2551). On February 8, 1975, Levy commenced the television advertisement of the Lennon rock and roll album which he called "Roots" (A. 14a).

On February 10, 1975 Lennon advised Levy that the use of his performances, name and likeness in the "Roots" album was unauthorized (DX CCCC at E 485). On February 13, 1975, Capitol released Lennon's album, which was called "John Lennon Rock 'n' Roll".

Viewing all of the evidence about the Cavallero Meeting and the events leading up to the release of "Roots" by Levy it is clear that there was a possibility that Lennon would agree to allow Levy to sell his "oldies" album through television mail orders and a possibility that Capitol and EMI would permit Levy to do so. However, things never advanced beyond this possibility to the point of an agreement on all the terms appropriate for a multi-million dollar deal, and no amount of rhetoric by plaintiffs and Levy can overcome this indisputable fact.

ARGUMENT

I

The Trial Court's Findings Are Not Clearly Erroneous and May Not Be Reversed on Appeal

Rule 52(a), F.R. Civ. P., governs the scope of this Court's review on appeal and provides:

> "In all actions tried upon the facts without a jury . . . [f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses".

Under Rule 52(a), "[t]he authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of fact, who is usually in a superior position to appraise and weigh the evidence." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). Thus, the question for the appellate court "is not whether it would have made the findings the trial court did", *Id.*, but whether such findings were "clearly erroneous". A trial court's findings are not "clearly erroneous" unless, "on the entire evidence", the appellate court "is left with the definite and firm conviction that a mistake has been committed". *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This rule also applies to factual inferences the trial court has drawn from basic facts. *Commissioner of Internal Revenue* v. *Duberstein*, 363 U.S. 278, 291 (1960).

It is the appellant, of course, who bears the burden of convincing the reviewing court that findings below were clearly erroneous, *Watson* v. *Joshua Hendy Corporation*, 245 F.2d 463, 464 (2d Cir. 1957), a burden which is extremely heavy where, as here, the trial court's findings are based largely upon the credibility of witnesses who have

testified. *Hedger* v. *Reynolds*, 216 F.2d 202, 203 (2d Cir. 1954). Indeed, findings based upon the trial judge's evaluation of oral testimony have been called "unassailable". *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 433 (2d Cir. 1945) [L. Hand, J.]. *Cf. Broadcast Music* v. *Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80 (2d Cir. 1949).

As more fully discussed *infra*, the factors in favor of affirming the trial court's findings in the present case are particularly compelling. The cornerstone of all plaintiffs' claims below was the alleged oral contract entered into at the Cavallero Meeting. The District Court's finding that there was no oral contract, was of necessity, based upon its assessment of the credibility of the numerous witnesses who testified to the events of that meeting, as well as the events which ensued. Accordingly, under the "clearly erroneous" test, Judge Griesa's finding that no oral contract was made is virtually immune from attack. *See United States* v. *Aluminum Co. of America, supra; St. Louis Typographical Union No. 8* v. *Herald Co.*, 402 F.2d 553, 557-58 (8th Cir. 1968). Yet on this appeal plaintiffs challenge the lower court's factual findings on the oral contract claim, not the legal standard used by the District Court—a standard (*see* A. 166a-67a), though overly charitable to plaintiffs, they still could not meet.

Moreover, the bulk of the remaining matters raised by plaintiffs and Levy go essentially not to Judge Griesa's conclusions of law but to his findings of fact.* Under normal circumstances, plaintiffs and Levy would have an almost impossible burden challenging the District Court's findings under the rigorous requirements of the "clearly erroneous" test; on the record from which they have taken the instant appeal the burden, as shown herein, is impossible.

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* In contrast, the single matter raised on Lennon's cross-appeal—the application of judicial estoppel—involves only law, the underlying facts being uncontrovertible.

II

The Trial Court's Finding That No Oral Agreement Was Entered Into Is Supported by the Great Weight of the Evidence

After hearing numerous witnesses and receiving substantial other evidence, the District Court found that no oral contract had been entered into by Lennon, Apple, Levy, Big Seven and Adam VIII. A review of "the entire evidence" reveals that this finding is clearly correct.

The District Court was asked to believe that an enforceable oral agreement had been entered into at the Cavallero Meeting based upon the following uncontested facts:

(a) Levy claimed that Lennon had breached a written settlement agreement worth "hundreds of thousands of dollars", and demanded that Lennon discuss the matter with him personally.

(b) At the time of the Cavallero Meeting Lennon had been under exclusive contract to EMI for 12 years. Seider, an attorney, had assisted in the negotiation and drafting of the 1969 EMI-Apple-Capitol agreements covering the recorded performances of Lennon and the Beatles. Lennon and Seider believed that Lennon was exclusively bound to EMI and Capitol by virtue of those agreements.

(c) The agreements were not available at the Cavallero Meeting nor were any representatives of EMI or Capitol present.

(d) Levy claimed that he surrendered all rights under the "valuable" October 1973 Settlement Agreement—an agreement made and formalized on the record in open court in the presence of Levy's attorney—in exchange for an *oral* agreement made over drinks at a supper club.

(e) Neither Levy nor Kahl, the plaintiffs' representatives at the Cavallero Meeting, made any note or memorandum of the alleged oral agreement, or any term thereof, that night, the next day or at *any* time thereafter.

The District Court listened to 12 days of testimony from each of the persons present at the Cavallero Meeting, and many other witnesses, reviewed numerous exhibits, and heard lengthy oral argument from counsel. The evidence revealed that Levy made numerous statements, several under oath, that the agreement entered into at the Cavallero Meeting gave him "world-wide" rights to sell Lennon's rock and roll album through mail orders and retail fulfillment centers. At trial, however, plaintiffs abandoned this claim thereby seriously impugning Levy's credibility—and sought relief based upon an agreement limited only to mail order sales in the United States only. This naturally "cast doubt" on whether there was a contract entered into and this "doubt" was transformed into a firm conviction by the "testimony" about the Cavallero Meeting. The "testimony" led the District Court to the inescapable conclusion that it "does not show by anything approaching a preponderance of the evidence" that the claimed oral agreement was entered into.

Reviewing only Levy's testimony, it is not difficult to understand how the court below reached the result it did. But when the testimony of the other participants in the Cavallero Meeting is analyzed the result is obvious.

As for the evidence of what transpired after the Cavallero Meeting (Levy's repeated requests that EMI be spoken to, the "exploratory" meeting among Levy, Seider and Graham, the failure of Levy to take steps after receipt of the 7½ ips tape from Lennon, which he claimed was the final version of the album, to manufacture and distribute the album, the January 9th letter asserting a false claim, Levy's insistence on releasing "Roots" after being told he had no right to because "I got a shot", and Levy's contradictory and inherently unbelievable testimony) there can be no doubt that viewed alone, it supports the District Court's finding "that no contract was entered into by Lennon or Apple granting Levy or one of his companies the

right to produce and distribute Lennon's rock and roll album." When that evidence is added to the evidence of what transpired at the Cavallero Meeting it is clear that there was a complete failure of proof on plaintiffs' part.

III

The Evidence Demonstrated Conclusively That Capitol and Hence Lennon Suffered Substantial Damages as a Direct Result of Levy's and Adam VIII's Tortious Conduct

Two elements of the defendants' proof of damages were substantiated by claims made by plaintiffs on their direct case. Defendants claimed that "Roots" caused confusion in the marketplace and detracted from the sales of "Rock 'n' Roll" and required Capitol to reduce the suggested retail price of "Rock 'n' Roll" by one dollar. Plaintiffs alleged in their State complaint and the amended complaint herein that one of the provisions of the oral agreement entered into on October 8, 1974 was that they would have the exclusive right to sell the album and that no one else would be selling it at the same time they were (DX CO, ¶14 at E 336, A. 12a, ¶15). Levy testified that it "would have to be an exclusive deal because while I am expending money on television, if any similar product or the exact same product went out under another label, I would have to get a royal screwing, because they could buy either product . . ." (A. 175); that he would have to take a "beating" if "Rock 'n' Roll" and "Roots" were on the market at the same time (A. 1771); and that such circumstances "would be a disaster for us". (A. 1778) However, plaintiff's counsel put it best during his opening statement:

> "Mr. Levy took the position that while the campaign was in progress, he did not want Mr. Lennon or Apple nor Capitol nor EMI to sell the same album through regular retail channels, because *this would create diffi-*

cult competition and confuse the customers". (A. 30-31) (emphasis added)

As for the one dollar price reduction, plaintiffs had originally alleged claims of predatory price cutting against the defendants in both the State court and in the District Court. (*See,* DX CO, ¶53C at E 343 and A. 16a, ¶35C and 21a, ¶60C.) Although plaintiffs dropped these claims prior to trial, the allegations recognized that the only possible reason Capitol could have for lowering the price of "Rock 'n' Roll" would be the price competition from "Roots".

Before turning to Levy's arguments on the confusion, price reduction and other bases for Capitol's and Lennon's damages, one significant and determinative fact must be noted—Levy and Adam VIII presented not a single witness to rebut Capitol's and Lennon's case on damages. They chose instead to rely solely upon cross-examination of Capitol's and Lennon's witnesses and where, as here, the burden on Lennon and Capitol was to prove their case by a preponderance of the credible evidence, the strategy adopted by Levy and Adam VIII was at best a high-risk gamble.* An undistorted and more complete examination of the trial record than that offered by Levy and Adam VIII reveals why that gamble was lost.

A. *Capitol's Very Real Rush To Compete With "Roots"*

In October 1974, Capitol's contempated release date for "Rock 'n' Roll" was March-May of 1975 (A. 2804). However, when faced in early February 1975 with the release, advertisement and sale of "Roots" the decision was made to rush the release of "Rock 'n' Roll", and thereby minimize the damage which was certain to be inflicted

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* It must be presumed that this trial posture was one dictated by the strength of defendants' case, rather than any voluntary decision by Levy and Adam VIII.

upon Capitol (as well as EMI and Lennon). (*See,* DX 49 at E 47)*

Even Levy and Adam VIII do not have the temerity to suggest that the decision to rush the release was not the direct and immediate consequence of their tortious conduct; instead, they claim that there was no evidence that the disruption of Capitol's timetable had even the slightest impact on the net sales of "Rock 'n' Roll". A review of the testimony of Don Zimmerman, Capitol's Executive Vice-President and Chief Operating Officer ("Zimmerman"), shows why the District Court found this assertion untenable.

1. The Effect on Promotional Items

Utilizing Defendants' Exhibit CX (E 397), which set forth a recapitulation of Capitol's activities pursuant to its marketing plan for "Rock 'n' Roll", Zimmerman explained in great detail the reduction in quantities and/or delivery delays on posters (A. 2785), T-shirts (A. 2786-87), buttons (A. 2787-88), post cards (A. 2789), stickers (A. 2789) and press kits (A. 2793)** resulting from the rush in releasing "Rock 'n' Roll". The effectiveness of these promotional items on sales was emphasized not only by Zimmerman, but also by David Marsh ("Marsh"), an associate editor and rock music critic for Rolling Stone Magazine, the acknowledged "Bible" of rock music. When asked by the Court what effect these items have on sales, Marsh testified:

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* In addition to pushing up the release date Capitol and EMI sent telegrams to Adam VIII's suppliers and advertisers, calling upon them to cease and desist from participating in the production and sale of "Roots".

** In addition to the reduction in quantities and/or delivery delays on these promotional items, a planned mobile had to be scrapped completely and a billboard on the Sunset Strip in Los Angeles was delayed (A. 2788, 2792).

"They are important in that they create a certain kind of word of mouth . . . .

* * * * *

"It reminds you that John Lennon has a record. And, more importantly, it reminds the people who get the shirts and posters and so on, it reminds the retailers, the critics and radio people." (A. 3307)

2. Capitol's Plan for Television Advertising

In the Fall of 1974 Capitol planned to promote the Lennon "oldies" album by extensive use of television advertising, in a manner similar to a very successful Capitol marketing program carried out in connection with a musical group known as The Beach Boys (A. 2775). The planned expenditure for television advertising was to be $150,000, which would have covered some 1100-1650 planned television "spots" (A. 2776). Instead, as a direct result of the television advertising for "Roots", Capitol placed only 29 television advertisements for "Rock 'n' Roll" (A. 2776). The reasons for this drastic cutback in television advertising were threefold:

(i) as discussed more fully, *infra,* Capitol, in order to compete with "Roots", was required to reduce its suggested retail price by one dollar. This price reduction, which results in a lower wholesale price, made heavy television advertising economically unfeasible;

(ii) even with normal pricing, the only television advertising which Capitol (or any other record distributor) can afford is "available time". As the purchase of this television time must be done six to eight weeks in advance, Capitol did not have enough time to plan a television campaign, even if such advertising was otherwise feasible (A. 2784);

(iii) the third and most obvious reason for the cutback in television advertising was the fact that this was the medium which Levy and Adam VIII were using for "Roots", and Capitol was justifiably concerned with compounding a bad situation by having two

major competing television campaigns running at the same time (A. 2785, 2597).*

Lennon testified in detail as to the inventiveness and thought involved with the television commercials for his other albums, "Mind Games", "Walls and Bridges" and "Shaved Fish" (A. 3133-37). Lennon also explained the equally imaginative idea he had for the "Rock 'n' Roll" commercial—and explained how this idea had to be abandoned because there was just not enough time (A. 925, 984-85, 3139-40). The television ad that was used by Capitol reflected the rush conditions under which it was prepared, and to use Mr. Lennon's own words: "I didn't have time to do it so . . . they made a cartoon" (A. 985) and "[f]or a T.V. commercial, there wasn't enough impact . . . ." (A. 3158) This was a matter clearly observable by the Court; it had an opportunity to compare prior Lennon television commercials with the one hastily prepared for "Rock 'n' Roll" (A. 2839-41; DX CZ, is a video tape cassette of the four Lennon television commercials).

3. The Use of Radio Advertising

Having been precluded from extensive television advertising, Capitol increased its radio advertising—an inferior substitute (A. 2779). However, even the radio spots, due to the time necessary for delivery to the stations, were

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* The reasons for Capitol being unable to "crank up" (Levy Brief, note p. 26) a television campaign once "Roots" was off the air, were fully explained by Zimmerman. In addition to Capitol's price reduction prohibiting large expenditures for television time, it was not until some *six weeks* following the release of "Rock 'n' Roll" that Capitol became even "somewhat secure Adam VIII's TV ads had been halted (A. 2782), and Capitol "had no assurance that the TV campaign by Adam VIII would not be renewed, if not on the stations that we had wired on other stations". (A. 2655) Moreover, the necessary lead time of six to eight weeks for purchasing "available time", the fact that the sales momentum of "Rock 'n' Roll", such as it was, had already gone into decline and the knowledge that it is not realistically possible to revive declining interest in a record album, foreclosed Capitol from mounting a television campaign, even if it could have been sure at some later date that Adam VIII's illicit advertisements had permanently ceased (A. 2783-85).

delayed until some ten days *after* "Rock 'n' Roll" was first released for sale—a delay which lessened their impact and adversely affected the sales of "Rock 'n' Roll" (A. 2778-79).

Aside from the Capitol radio commercials, Lennon testified that his normal practice in promoting his albums is to "sweep the country" with radio interviews (A. 3192). However, because Capitol had to rush the release of "Rock 'n' Roll" in order to compete with "Roots", Lennon was only able to do one interview on a local New York City station —and none on the West Coast (A. 3193-94).

4. Advertisements in Billboard, Cash Box and Record World

Levy and Adam VIII stress that advertisements which Capitol planned to run in the trade press (Billboard, Cash Box and Record World) were in fact placed in issues which went on sale February 17, 1975, only four days after the release of "Rock 'n' Roll" (Levy Brief, p. 25). What they conveniently fail to mention is that such ads, to be most effective, must appear on or before the release date of the album (*see*, A. 2790). Moreover, Capitol was forced to use a two-color ad instead of the four-color ad it would have preferred and which would have had more impact (A. 2790). Lastly, because placement of the ads was on a rush basis, a preferred placement (i.e., back page) was not possible (A. 2790).*

5. The Album Cover

Another aspect of the "Rock 'n' Roll" album which was slighted because of the rush was the album cover, almost as important a part of the production as the music itself (*see* POINT IV, *infra*). After Lennon explained in detail the care he and the Beatles took with their album covers (A. 974-79) the Court asked why the "Rock 'n' Roll" cover

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* As for the consumer press—Rolling Stone Magazine and National Lampoon—circumstances were such that the first ads did not appear until the May 1975 issues (A. 2791-92)—over two months after the release of "Rock 'n' Roll".

was "less elaborate" than "Walls and Bridges". Lennon testified that "there was no time . . . [b]ecause Capitol said we have got to go now,* you know, and I just went in and cut the thing and sent it to them. There was no time for gimmicks or posters or anything." (A. 980) Lennon also testified that he had plans to have a credit list of the numerous famous artists who performed on the "Rock 'n' Roll" album with him, plans which he had to "drop" because of the rush (A. 985).

In short, there was not a single element in the marketing of the "Rock 'n' Roll" album that was not affected by the rush necessary to compete with "Roots". As stated by Zimmerman and uncontradicted by Adam VIII and Levy:

> "From the time we received the finished components until the time that the record was actually shipped to our customers was a week. . . . This is a process that generally takes about six weeks.
>
> "As a result of putting this record out in a week, we were unable to not only develop a proper long-range and hard impact plan on the day of release—however, even the support ingredients that are necessary to properly merchandise the product were not available for a period of four to six weeks after release.** (A. 2596-97)
>
> * * * * *
>
> "Just about everything that is ingredients on the marketing plan [was missing in the record shops]: the poster, the tee shirt, the stickers, the buttons, the consumer ads were late which would attract consumers, the radio spot was late, the television spot, due to the

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* Lennon had earlier testified that right after he and Seider spoke to Coury on January 30, 1975 he got a call from Capitol to "'Make the masters'" (A. 969-70).

** Normally, with an album by an artist of Mr. Lennon's stature Capitol's salesmen go to their customers two weeks in advance of the release date; the salesmen would show the graphics for the album cover and would have available the mobile, the posters and other promotional items. Accordingly, when the album goes on sale to the consumer, the retailers would have promotional displays set up and sales people wearing John Lennon T-shirts (A. 2669).

> limited use that we did give it was late. There was nothing there [in the record stores] at the day of release. We needed that absolute impact. All this in terms of consumer awareness would also reflect in revenues gained on that particular album." (A. 2814)

Neither Capitol and Lennon nor the District Court resumed to evaluate in dollar terms the damage caused the rushing of the release of "Rock 'n Roll" as opposed the damage caused by the confusion of two purportedly similar albums being advertised and sold at the same time. (Indeed, the District Court in its findings did not specifically refer to consumer or customer confusion.) What Capitol and Lennon did show, and what the District Court found, was that the rush and all other attendant circumstances were the cause of the lower net sales of "Rock 'n' Roll".

B. *Capitol's and Lennon's Evidence of Confusion Caused by "Roots" Was Properly Received in Evidence*

Levy does not argue that there was no evidence of customer and consumer confusion caused by "Roots", but rather that such evidence was hearsay and, therefore, inadmissible. However, *Zippo Manufacturing Co.* v. *Rogers Imports, Inc.*, 216 F.Supp. 670 (S.D.N.Y. 1963), relied on by Levy, and Rule 803(3) of the Federal Rules of Evidence, specifically recognize the propriety of permitting witnesses to testify as to statements and information received from third parties concerning their then existing state of mind.

Judge Feinberg's opinion in *Zippo Manufacturing* was directed at consideration of whether public surveys were themselves subject to the hearsay exclusion and in finding that they were not, he reasoned that they were no more objectionable than "using expert witnesses to testify to the state of the public mind". 216 F.Supp. at 684 (footnote omitted). Therefore, even by the yardstick of the legal authority urged by Levy, Messrs. Zimmerman, Lennon and Marsh, whose combined expertise encompasses every espect of the music business, were properly permitted to testify both

as to their opinions of consumer confusion, as well as to statements by third parties evidencing such third-parties' state of mind. *See Falcon Industries, Inc.* v. *R. S. Herbert Co.*, 128 F.Supp. 204, 209 (E.D.N.Y. 1955); Recommended Procedures For The Trial of Protracted Cases, 25 F.R.D. 351, 423 (1960). Clearly a consumer survey was not essential to show public confusion.

The effect of the confusion resulting from having "Roots" being offered for sale at the same time as "Rock 'n' Roll" was graphically explained by Mr. Lennon:

> "It is like having two shows opening at the same time, somebody is opening with a rough print [referring to the unfinished 'Roots' album] of the movie in the Village, and the main movie is trying to be shown uptown, they are advertising both movies, and people don't know which movie to go to . . . .
>
> "I don't know how else to say it. They were confused by it, and the industry was confused." * (A. 3146)

Zimmerman's testimony was similar, except he also testified to the substantial confusion among Capitol's sales and promotion force and its direct customers** (A. 2590-92).

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* When Levy's counsel objected to Lennon's qualifications to state an opinion as to the public's confusion, Lennon aptly noted:

> "I met the public, who talked to me about my product." (A. 3146)

In response to an unspecified objection to music critic Marsh's testimony about his own confusion and the widespread confusion in the music industry, Judge Griesa stated:

> "I don't think this is hearsay. Here is one man connected with this business, and he says what he did and heard."

Counsel for Levy then disclaimed that he was objecting on hearsay grounds (A. 3275).

** These are primarily sub-distributors known as "rack-jobbers". Because their customers (department stores, discount houses and drug stores) are also the outlets to which Adam VIII typically sells directly, these rack-jobbers restricted their purchases from Capitol for fear that their customers would be purchasing directly from Adam VIII (Zimmerman, A. 2688). The fact that "Rock 'n' Roll" did "very well" (Levy Brief, p. 27) in early sales at the wholesale level requires the conclusion that were it not for "Roots", "Rock 'n' Roll" would have sold far better, not that "Roots" had no effect whatsoever.

Levy and Adam VIII seek to characterize their television advertisement of "Roots" as short-lived and unseen. The evidence, however, shows the contrary. Defendants' Exhibit AR (E 285), contains a schedule prepared by Adam VIII (E 290-91) showing that the television commercials for "Roots" ran from February 8, 1975 (in such cities as New York, Chicago and Philadelphia) until as late as February 17, 1975 (in Cincinnati). Moreover, these commercials ran in other major cities throughout the United States—Washington, D.C., Peoria, Youngstown, St. Louis, Miami, Minneapolis, Detroit, Cleveland, Baltimore and Pittsburgh, and there are more. Adding the days indicated for the cities listed in the schedule contained in DX AR demonstrates that the "Roots" commercial appeared for a total of 119 viewer days—hardly a "few days of TV commercials in limited markets" (Levy Brief, p. 19).

To give the District Court some idea of the numbers of people who were actually exposed to the "Roots" commercial, Capitol presented Charles Petty ("Petty"), an advertising executive (spot broadcast supervisor) with the J. Walter Thompson agency (A. 2607-08). Based upon a sampling of just a few of the television "spots" for "Roots" (DX CU at E 390)—and based on the assumption that such "spots" were aired during the time period of least television viewing—Petty showed by use of statistical information supplied by recognized television monitoring services (ARB and Nielsen) the numbers of households which viewed each particular "spot" (DX CV at E 395). Based on ARB statistics, 1,339,000 households (which could include more than one person) viewed 59 of the "Roots" spots aired in eight cities; the Nielsen statistics showed that of 41 out of these same 59 spots the number of viewing households was 1,592,000 (DX CV).

Petty acknowledged that these estimates of viewing households included a duplication factor, since some households viewed the spots more than once (A. 2618). However, based upon his experience with "unduplicated cum stud-

ies," * Petty, who at first declined to give a precise figure for the amount of duplication, testified that he would estimate that the number of unduplicated households contained in the 1,592,000 figure (based on Nielsen statistics) on Defendants' Exhibit CV was close to 800,000 (A. 2618-19). When one considers that "Roots" ads appeared in 24 major cities (*see* DX AR at E 290-91), and that in just six of those cities the ads were seen by persons in 800,000 different households, the true impact of Levy's and Adam VIII's tortious conduct becomes readily apparent.

Thus, having shown that it was forced to rush the release of "Rock 'n' Roll" and that there was confusion created by the sale and advertisement of "Roots", Capitol went on to translate these adverse factors into specific lost sales.

C. *The District Court's Assessment of Capitol's Loss of 100,000 Sales Is Reasonable and Fully Supported by the Evidence*

Adam VIII and Levy expend considerable effort challenging the award made to Capitol, EMI and Lennon for damages arising from lost sales of "Rock 'n' Roll", which sales would have been made but for Levy's and Adam VIII's release, advertisement and sale of "Roots".** However, rather than focus upon the evidence relied upon by the District Court in determining that sales of 100,000 albums were lost to Capitol, Adam VIII and Levy elect instead to discuss a number of matters irrelevant to Judge Griesa's findings.

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* Petty explained that unduplicated cum studies are surveys which determine the amount of duplication of households contained in the gross figures for households viewing a particular television commercial (A. 2619).

** Concededly, the fixing of the number of albums which would otherwise have been sold by Capitol cannot be done with "laboratory precision" (A. 3469); however, such accuracy is not required. To quote Levy: "... it is the general rule that a wrongdoer should not be allowed to escape liability where his wrongdoing has made it difficult to prove the *amount* of damages with mathematical certainty". (Levy Brief, p. 17) *See* Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931).

1. The Basis for The District Court's Award

In finding that lost sales amounted to only 100,000 albums, the District Court took an ultra-conservative view of the substantial evidence offered by Capitol, which evidence could well have supported a finding of lost United States sales of anywhere from 159,000 to 422,000 (DX DC at E 402; *see* A. 3838-39).

Having listened to all or parts of a number of Lennon recordings including—in addition to "Rock 'n' Roll"—"Walls and Bridges", "Imagine", "Mind Games" and "Two Virgins", having considered that "Rock 'n' Roll" received some "highly critical and unfavorable reviews", and having considered that the economic recession had affected Capitol's sales, Judge Griesa concluded that "it would be ignoring reality to believe" that the presence of "Roots", its advertisement on television and the "disadvantageous and rushed conditions" under which Capitol's marketing program was carried out, "did not have an effect upon the sales of Rock and Roll". (A. 3468)

In arriving at a projected sales figure of 442,000 units, which Judge Griesa deemed to be a "reasonable estimate" (A. 3469), he used the 425,000 domestic sales of "Walls and Bridges" as one "benchmark" and Capitol's projection of 520,000 units, based upon the historical sales of Lennon's albums in Canada, as another (A. 3468).

In colloquy with Levy and Adam VIII's counsel following the announcement of his findings and conclusions on defendants' counterclaims, Judge Griesa expounded further on the means by which he arrived at the 100,000 figure for lost sales:

> "Now, when all was said and done I was interested and I gave some modest amount of attention and weight to Mr. Posner's presentation with respect to the Canadian market share feature, but I ended up making an estimate which admittedly was nothing more

than an estimate and adjustment of the kind that has to be made in these circumstances.

"I did not extend that estimate by any means up to the full extent of Mr. Posner's proposal. I was for [*sic*] short of his figures.

"If I had taken his projections about Canadian market share and really used that to the full extent suggested by Capitol and Mr. Posner, I would have gone far higher than an estimate of sales loss of 100,000 records.

"I would have gone up to the 150,000 mark or maybe the 200,000 mark, but I would have gone far higher than the 100,000.

• • • • •

"The big factor, the major factor that I relied upon as far as statistics was the dip from—I think the figure was—

Mr. Schurtman: 425

The Court: 425 [on "Walls and Bridges"] down to the 342 figure for Rock-'n'-Roo [*sic*], that was the major reliance. Rightly or wrongly, that was the major reliance and I made that perfectly clear in the findings I dictated.

"I increased, I went slightly over the 425 to give the 100,000—in other words, my 100,000 represented an estimate that Rock-n-Roll would have sold about 432,000 [*sic*], slightly over the 425 and in doing so I gave some modest weight to the Canadian." (A. 3838-39)

2. The Canadian Projections

Aside from evidence (DX DE at E 404-05) that Capitol had, in February 1974, long before the interference by Levy and Adam VIII arose, projected that sales for "Rock 'n' Roll" would be 750,000 units, Capitol presented to the District Court nine methods of statistical analysis showing what sales for "Rock 'n' Roll" should have been but for the competition and interference of "Roots". Among these, the one which the District Court found the most significant —and yet only gave "modest" weight—is reflected in Defendants' Exhibit DG (E 407).

Defendants' Exhibit DG showed that the Canadian share of sales on the two Lennon albums preceding "Rock 'n' Roll" were 13.6% and 11.5% respectively, or an average of 12.5%. Accordingly, based upon this historical percentage share of Canada versus United States on the two preceding albums, "Rock 'n' Roll", which sold 65,000 units in Canada, should have sold 520,000 units in the United States.* As compared to the actual United States sales of 342,000 units, the Canadian sales on "Rock 'n' Roll" of 65,000 units reflected a dramatic increase in the Canadian share from 9.4% (based on all preceding Lennon albums) and 12.5% (based on the two preceding albums) to an unprecedented high of 19%.** (DX DF at E 406)

Defendants' Exhibit DJ (E 412) shows in graphic terms the historical parallel that existed between Canadian and American sales on Lennon's albums, a parallel which existed on all of his albums except for "Rock 'n' Roll".

The Canadian statistics would, of course, be valueless if "Roots" had been released, advertised and sold in that country. But, it is precisely because the Canadian consumers were not exposed to "Roots" that the Canadian experience proved of some significance to the District Court (A. 2895).

The District Court's "modest" reliance on the Canadian "market share" analysis is challenged by Levy and Adam VIII on the grounds that (a) insufficient foundation was laid to permit the admissibility into evidence of such statis-

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* As reflected on DX DF (E 406), if using the same statistical approach, the Canadian percentage share were computed using *all* of Capitol's Lennon albums preceding "Rock 'n' Roll", the United States sales should have been 691,000 units.

** The dramatic nature of this increase of from 6.5 to 8.6 percentage points is heightened by the analysis reflected in DX DH (E 408) and DX DI (E 409). DX DH shows the average Canadian share of unit sales compared to United States unit sales for all Capitol albums released in February 1975 (the month when "Rock 'n' Roll" was released) to be only 8.6%. DX DI shows the average Canadian share of unit sales for all Capitol albums released from December 1974 to April 1975 to be 9.7%—both figures remarkably close to the historical Lennon share of 9.4%.

ties and (b) that their counsel were misled by the Court into believing that no weight would be given to the Canadian statistics. Both grounds are demonstrably without merit.

Harold Posner ("Posner"), Capitol's Director of Financial Planning and Analysis, who supervised the preparation of the statistical analysis and who testified to nineteen years of working experience with Capitol, initially in marketing, but for the most part as a financial analyst, was clearly qualified as an expert to render an opinion as to the validity of the various statistical approaches presented by Capitol to demonstrate the adverse effects of "Rock 'n' Roll" on the sales of "Rock 'n' Roll" (A. 2852-53). Concerning the Canadian market share, Posner testified: ". . . Canada . . . seemed to me offered a very good control market." (A. 2891)

Later, on cross-examination, Posner offered:

> We have experience that—if you look at the Canadian sales, you look at the United States sales on various artists, there seems to be a pattern developed and basically artists that are successful in the States are often usually successful in Canada. There is a relative relationship. But especially if you take the same artist and you compare his relationship over time, you could easily tell how Canada is reacting to the United States. (A. 3033-34)

This testimony alone provides a sufficient foundation for the admissibility of the Canadian statistics. *See* Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351, 423 (1960), cited with approval in *Zippo Manufacturing Co.* v. *Rogers Imports, Inc., supra.*

Moreover, examination of the portion of Posner's cross-examination (A. 3028-39) which Levy contends "focused on the most glaring deficiencies and inconsistencies in the Canadian figures" (Levy Brief, pp. 37-38), reveals that Posner, contrary to Levy's assertion, was indeed knowledgeable on Canadian advertising (A. 3038-39) and promotion methods (A. 3032-33), and when Posner was cross-

examined on his knowledge of Canadian l. cal tastes, he testified as follows:

> "Q All I am suggesting to you is that perhaps Canadian tastes are not the same as Americans' tastes. H... you taken that into account—
> "A Well—
> "Q —in preparing your projections?
> "A *That is what this* [market share analysis] *does, Mr. Schurtman.*" (A. 3035) (emphasis added)

Finally, Levy asserts that Posner disclaimed being "personally familiar" with the "state of the Canadian economy". (Levy Brief, p. 36) Specifically, Posner was asked the following question on cross-examination:

> "Q Do you know what the state of the Canadian economy was compared to the American economy in 1974 and 1975 and other dates you have on here [referring to DX DI (E. 409)]? Are you in a position to give us a point-by-point comparison?" (A. 3037)

In answer to this question, which called for a month-by-month comparison of presumably such things as the Canadian and United States balance of payments, consumer price index, wholesale price index, rates of inflation, etc., Posner understandably stated:

> "A No, I cannot." *

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* Of interest are the figures reflected on DX DI for an album released by George Harrison, another former Beatle, in December 1974 (about a month and a half prior to the release of "Rock 'n' Roll"). It shows the Canadian market share to be 9.9% of American sales—a market share only .5% higher than the average market share enjoyed by the five Lennon albums preceding "Rock 'n' Roll" (*see* DX DF at E 406). Moreover, as noted *supra*, the average Canadian market share for all Capitol albums released from December 1974 to April 1975 is 9.7% (DX DI at E 409), a figure closer yet to the Lennon historical average of 9.4%. If major differences material to the purchase of Lennon albums existed between the Canadian and American economies during the period 1974-February 1975, one would reasonably expect a far greater difference in these numbers. The answer is, and the uncontradicted testimony shows, that insofar as record sales of a ***major recording artist*** such as Lennon are concerned, economic conditions have the most minimal effect on sales (A. 3021).

The evidence of Canadian statistics was most certainly properly received by the Court. Furthermore, Levy and Adam VIII, who seemed to experience no difficulty in finding expert witnesses to testify on other matters, were unable to summon even one witness to contradict Posner's analysis.

Thus, we come to Levy's and Adam VIII's second point of contention with respect to the Canadian sales statistics —that they were "sandbagged" by Judge Griesa into believing that he would accord no weight to this evidence (Levy Brief, p. 38). This assertion is so directly contrary to the facts on the record that it may properly be labeled as reckless. To fully appreciate how absurd this claim is requires a reading of the following pages in the Joint Appendix: 3129-30, 3042-45, and 3847-50; *see also,* A. 3851-61, 3933-39. A review of these portions of the record shows that Judge Griesa was accurate when, in responding to the same accusation now again raised on appeal, he stated:

> "I said in effect that I would consider the evidence on the basis of what was in the record, see what it meant and that was that. I don't see how anybody could be misled to believe that the Canadian figures somehow weren't in for whatever they were worth. I didn't know what they were worth at that point. They might be worth a lot, they might be worth little, and I so stated to counsel." (A. 3850)

In view of the clarity of the trial record on this point, it is shameful that Levy and Adam VIII should seek again to rely on this specious claim of prejudice.*

However, as noted the District Court's principal reliance was not on the Canadian figures, but on the sales of "Walls and Bridges."

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* Equally without merit is the claim (Levy Brief, note p. 38) that information concerning the Canadian statistics was withheld by defendants during pre-trial discovery. The simple fact is that the information had not been furnished because it had not been requested (*see* A. 253a).

3. Lennon's Prior Albums*

The facts of life in the recording industry were testified to by Zimmerman, a man described by Levy's and Adam VIII's counsel as "an expert on sales" (A. 2643):

> "... [I]t's an on-going, almost Domino theory that success breeds success and lack of it or mediocre success in terms of people's thinking about a product will carry through unless they get a tremendous—you know, some great force of circumstances can change that. (A. 2602)
>
> * * * * *
>
> "... I think that, you know, as Mind Games was an excellent album and did respectably well [as compared to "Sometime In New York City"], Walls and Bridges did much better, and I think given a full chance, Rock and Roll could have done exceptionally well." (A. 2720)

Thus, barring "some great force of circumstances", Capitol reasonably expected that "Rock 'n' Roll" should have enjoyed sales at least as good as, and, indeed, substantially better than, sales of the preceding album, "Walls and Bridges", which sold 425,000 and which in turn represented an increase in sales of 49,000 albums over its predecessor, "Mind Games".

This momentum effect exerted by one album upon another is even more dramatically visible in the case of the following three albums:

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* Nowhere in Judge Griesa's findings and conclusions, or in his subsequent statements is there even the slightest suggestion that he relied upon averages of sales on all or some of the Lennon's prior albums. Yet, an inordinate portion of Levy's damage brief is devoted to discussion and purported analysis of average sales (Levy Brief, pp. 13, 29-32)—a discussion concluded with the statement that the averaging of past sales of Lennon albums is in the first instance not a valid measure for lost sales on "Rock 'n' Roll". As the District Court did not rely on averaging of past sales of Lennon's albums, and since an averaging of past sales is unnecessary to support the award made to Lennon, we shall not burden the Court with unnecessary argument on that point.

Date of Release	Album Title	United States Net Sales
12/69	"Live Peace in Toronto 1969"	389,000
12/70	"John Lennon With Plastic Ono Band"	702,000
9/71*	"Imagine"	1,553,000

(*see* Levy Brief, p. 6)

Concededly, "Sometime In New York City", the album following "Imagine", was commercially unsuccessful. The reasons for the poor sales of this album, as well as the albums, "Two Virgins", "Unfinished Music No. 2: Life with the Lions", and "Wedding Album" were explored at length during the trial. As for the latter three albums, they are so obviously avant-garde and uncommercial in nature that no one, including Levy and Adam VIII, seriously contends that they are musically or commercially comparable to "Rock 'n' Roll". "Sometime In New York City", although it did contain two rock and roll songs similar to those on "Rock 'n' Roll", was otherwise comprised of either overtly political,** or avant-garde music similar to that on "Two Virgins" and "Wedding Album".

Music critic Marsh gave telling testimony as to why "Sometime In New York City" was a commercial failure: "Sometimes [*sic*] in New York City he got political and the rock community tends by and large to mistrust people who are overtly political." (A. 3259, *see also* A. 2717-19)

Considering the diversity of his talents and the breadth of Lennon's interests, it is not an easy task to define what is and what is not "characteristic" Lennon. Much more susceptible to determination is the matter of what is *com-*

* Through apparent inadvertance, the table at page 6 of the Levy Brief incorrectly lists the date of release of "Imagine" as 6/72 and the release date of "Sometime In New York City" as 9/71. In fact, "Imagine" was released 9/71 and "Sometime In New York City" was released 6/72 (*See* PX 110 at E 153).

** Compare the titles "Woman Is the Nigger Of The World", "Attica State", "Angela", etc., appearing on "Sometime In New York City" with some of the rock and roll "classics" contained on "Rock 'n' Roll", *viz.*, "Do You Want To Dance?", "Be-Bop-A-Lula" and "Peggy Sue".

mercially salable Lennon. Zimmerman, Posner *and Levy** all agreed—"Rock 'n' Roll" was most definitely commercial. Most significantly, Marsh testified (testimony which may well have been the basis for Judge Griesa's use of "Walls and Bridges" as one of his "benchmarks", and which without doubt justifies such use) that in his opinion "Rock 'n' Roll" was "intrinsically more commercial" than "Walls and Bridges" (A. 3302). Judge Griesa (who listened to "Rock 'n' Roll", "Walls and Bridges", and other Lennon albums), though recognizing the obvious differences, did what any jury would have done: arrived at the reasoned judgment, based upon what he heard, that "Rock 'n' Roll" was surely as commercially salable as "Walls and Bridges", and more so.

4. The "Causes" Suggested by Levy

Levy suggests the economic recession, the fact that "Rock 'n' Roll" was supposedly not a characteristic Lennon album, and the unfavorable reviews, as the proximate cause of the significantly low sales of the "Rock 'n' Roll" album. Aside from the fact that Judge Griesa clearly considered all of these factors—and in finding lost sales of 100,000 obviously gave weight to some or all of them—there was substantial evidence to justify the District Court's conclusion that the advertisement and sale of "Roots" was principally responsible for "Rock 'n' Roll's" relative lack of success.

(a) *The Economic Recession Had Little Effect on the Sales of Capitol's Major Recording Artists*

The uncontradicted testimony by Posner was that the decline in the American economy during 1974 and 1975, although possibly adversely affecting the sales of Capitol recordings generally, did not materially affect the sales of Capitol's albums of major recording artists (A. 3021).

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* See p. 59, *infra*, where Levy's grandiose sales estimates for the artistically inferior "Roots" album—estimates made under oath—are discussed.

Having less dollars to spend makes the record consumer less likely to "experiment" with albums by new or otherwise unknown artists and more likely to spend his record dollars on established "super-stars" like Lennon and the other former Beatles (*Id.*). Accordingly, Levy's suggestion that the economic recession bears major responsibility for the lower sales of "Rock 'n' Roll" must be rejected.*

(b) *The Supposedly Uncharacteristic Nature of "Rock 'n' Roll"* **

When on the first phase of the trial Big Seven, Adam VIII (and Levy) were vainly attempting to convince the District Court that an oral contract had been made for Levy to advertise and sell the "Roots" album, Levy (who has years of experience as a record manufacturer and distributor) swore under oath that the Lennon recordings of which "Roots" and "Rock 'n' Roll" are comprised, represented a virtual gold mine. Although Levy encountered a great deal of difficulty deciding whether he was talking about just mail order sales or mail order sales and sales through retail fulfillment centers, he never waivered in his assertion that the album should have sold 2,000,000 copies in the United States (A. 1862, 1891-95).***

Judge Griesa obviously did not consider "Rock 'n' Roll" to be a musical gold mine, but by the same token, neither did he consider it to be of the same ilk as "Two Virgins", "Wedding Album" and "Sometime In New York City."

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* Moreover, the general decline of Capitol's sales was, as explained by Zimmerman, attributable to factors aside from the state of the economy (A. 2707-08).

** "Moon Dog Matinee" by The Band, a record album which Levy says is comparable to "Rock 'n' Roll", (Levy Brief, note p. 23), as explained by Zimmerman, is particularly inappropriate for comparison purposes (A. 2711-12).

*** In response to the anticipated argument by Levy and Adam VIII that Levy's estimates of two million in sales was based upon the plan for a massive television sales campaign, we direct the Court's attention to A. 2772-76, wherein Zimmerman testified in detail concerning Capitol's plan for a major television ad campaign—which plan had to be scrapped because of the difficulties caused by "Roots". See pp. 42-43, *supra*.

Levy and Adam VIII presented no witnesses to testify that "Rock 'n' Roll" was not commercially salable and Levy, the only witness they did present who purported to have sufficient expertise to render a judgment as to the sales potential of the album, gave testimony which made Zimmerman—who estimated sales of 750,000 albums—look like a piker.

(c) *The Unfavorable Reviews*

Levy and Adam VIII quote at length from certain of the reviews of "Rock 'n' Roll" which appeared after its release by Capitol. They are, however, unable to cite to any testimony in the trial record which would support their contention that these unfavorable reviews had a material effect on sales. The reason is simple: not only was there no such testimony, all the evidence was to the contrary.

Zimmerman testified that Grand Funk Railroad, a former Capitol recording group which received consistently bad reviews (". . . negative and in the strongest sense of the word."), nonetheless sold millions of record albums (A. 2843-45).

Even more significant, however, is the testimony of David Marsh. If anyone could be expected to have a vested interest in emphasizing the impact of reviews on the purchase of recordings by consumers, it would be Marsh, one of the most prominent rock music critics in the United States. Yet, Marsh candidly admitted:

> "It is clear to me that an artist has a basic quality and after he has been around and established a career, he has a basic audience that buys pretty much everything he does *that is meant to be a commercial record.*
>
> • • • • •
>
> "I don't think that artistic questions are directly felt by consumers, and *I think that is borne out by my experience as a reviewer or critic, that readers do not really agree with us as a group, and that some of the*

most widely panned sell the most records, to judge from their trade charts.

• • • • •

"I remember at that time [May 19'., when the Landau review of "Rock 'n' Roll" appeared in Rolling Stone (PX 201 at E 155)] being impressed by the amount of reader response we got from that and how favorable to the album it was, how *people were saying this is a great record,* the people who write letters.*

"Now, that is my basic contact with the rock consumer." (A. 3300-01) (emphasis added)

And despite vigorous cross-examination, Marsh remained steadfast in his testimony that reviews are not significant "[i]n terms of sales." (A. 3308)

5. The Initial Sales at the Wholesale Level

Levy's remaining argument, that "Rock 'n' Roll" did "remarkably well in the early stages", was fully considered by the District Court, and properly rejected. Levy points to "Rock 'n' Roll's" early position on the "charts" and Plaintiffs' Exhibit 233 (E 179), which gives a weekly breakdown of wholesale sales of "Rock 'n' Roll" and other Lennon albums, to support the contention that "Roots" had no adverse impact on Capitol's sales.

The "charts", however, only show the *relative* sales of albums (*i.e.,* how the sales of one album compare to other albums then being sold) (A. 3040) and Zimmerman and Lennon both testified that these charts do not reflect consumer sales** (A. 2724, 3200-02).

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* So much for Levy's idle speculation (Levy Brief, pp. 12 and 35) that the "word got around among consumers that this was not a typical Lennon album and sales thereupon fell off" and "that once Lennon's fans started listening to "Rock 'n' Roll", they simply did not like it. . . . "

** One of Levy's grossest distortions of the record is his citation to A. 3198, for the proposition that Lennon admitted "that the charts are an important guide [to sales] in the industry. . . . " (Levy Brief, p. 28) What Lennon stated was: "I read the charts, yes. They are not as painful as the sales." As for Marsh's opinion of the reliability of the "charts", he testified: "[N]o one has convinced me yet that they are accurate." (A. 3312)

As for Plaintiffs' Exhibit 233, it shows that in the first two to three weeks Capitol had managed to effect wholesale sales on "Rock 'n' Roll" comparable to that which it had on "Walls and Bridges". However, it also shows that after this two to three week period, "Rock 'n' Roll" sold dramatically less. Judge Griesa concisely summarized the thrust of Zimmerman's testimony on this point:

> "Look, Mr. Schurtman, he has said many times, he may be right, he may be wrong, but let's at least grapple with his testimony, that the effect was on the ongoing sales, and I think that it is—what he is saying is that the salesmen went out and were able to persuade the stores and the rack jobbers to buy a lot of records.
>
> "That was in the first two weeks or even—whatever, three weeks. Then the ability to keep on selling records to the rack jobbers and to the stores would depend on the ability of those—of the retailers during that time to actually move them to the consumers.
>
> "If they get a lot of stock in and the records are not moving to the consumers, they won't keep ordering them because they will not be able to resell them.
>
> "He has said that many times." (A. 2816)

When asked by Levy's counsel if he agreed with the Court's understanding of his testimony, Zimmerman responded: "Absolutely." (A. 2816)

When during summation Levy's counsel sought to advance the very same argument put forth on this appeal—that early consumer sales of "Rock 'n' Roll" were not adversely affected by "Roots"—Judge Griesa again stated what the evidence clearly shows:

> "Your arguments were the immediate sales were high and they fell off so the publicity which was intended to have the impact on immediate sales was very good and therefore there was no lack of impact from lack of publicity, but the point is that those figures that we talked about endlessly were the figures of Capitol to its customers and they were not the consumer sales, and it was the testimony repeated again and again that

the consumer sales, if they are not good at first, can cause the withdrawal and lowering of later orders by the wholesalers, and that is what happened." (A. 3436)

D. *The District Court's Finding That the $1.00 Price Reduction Was Reasonable and Necessitated by Levy's and Adam VIII's Tortious Conduct Is Amply Supported by the Record*

At the same time that Levy and Adam VIII complain that defendants "failed to exercise reasonable care to avoid damages" (Levy Brief, Point VI, pp. 46-49), they urge that Judge Griesa's award of the lost profits which flowed from Capitol's decision to reduce the suggested retail price of "Rock 'n' Roll" from $6.98 to $5.98—a reduction made to provide Capitol a competitive edge over and mitigate damages caused by the unauthorized "Roots" album—was erroneous.* However, their argument that the price reduction was not the immediate and direct result of the release, advertisement and sale of their pirate album "Roots" ignores their own prior position (*see* p. 40, *supra*) and the substantial evidence to the contrary.

Levy's and Adam VIII's counsel, while urging that the price reduction was unnecessary, asserted:

> "... They decided to kill** Levy in two ways: by sending the telegrams and trying to get him off the air and cutting off his suppliers, and by killing him in the marketplace.
>
> "This was an economic decision. It was not a necessary consequence of what Levy did. They regarded him as a pirate and they were out to get him by whatever means they could, including by what I could only refer to as predatory pricing, cutting the price below

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* Prior to making this price reduction, Capitol determined that it could still make a profit, albeit a much lower one (A. 2576-77, 2863, 2865).

** We note that Judge Griesa, upon hearing this argument, stated that there was no evidence of any intent by Capitol to "kill" Levy (*i.e.*, no evidence of predatory pricing). Whereupon Levy's counsel stated: " . . . I will take back the kill Levy part." (A. 3433)

> the normal wholesale and retail prices. They figured if the price is cut low enough they will demolish Levy and teach everyone else a lesson." (A. 3432)

That, of course, is the whole point: but for Levy's and Adam VIII's commercial piracy, Capitol would never have deviated from its standard price. As Posner testified:

> "It would have been just like every other album we release, if it had not been for the competitive album.
>
> "I would like to add one other thing. Capitol's basic objective is to make—to maximize profits as best it can in the conduct of its business. And certainly if we had been able to release the album at $6.98, we would have done so because we would have made more profit." (A. 2864-65)

Thus, under the "necessary immediate and direct" test of causation* urged by Levy and Adam VIII, there can be no doubt that the price reduction was an immediate and direct result of their wilful and tortious conduct; the only remaining question is: Does the record contain sufficient support for Judge Griesa's finding that Capitol's action was reasonable?

It is clear that the District Court fully considered the contentions Levy now raises on appeal, *viz.*, that the Capitol suggested retail price was subject to discounts and that the $4.98 mail order price on "Roots" was not. The issue now before this Court is not whether there is some evidence to support Levy's contentions but whether there is sufficient evidence to support the District Court's findings.

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* The test of causation in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931), cited at page 17 of the Levy Brief, must be considered in light of the *Story Parchment* Court's alternative formulation—that the damage be the "natural and probable" consequence of the tort. *Id.* at 561. *See also*, Butler v. Manhattan Ry. Co., 143 N.Y. 417, 422 (1894). Indeed, a reading of *Story Parchment* reflects an attitude of judicial flexibility towards causation in cases of intentional tort—an attitude supported by learned commentators, legal precedent and reason. *See*, C. McCormick, Damages §74, pp. 263-64 (1935)

Judge Griesa held:

> "I have considered the evidence about the discounts in the regular retail market and the lack of discounts in Levy's TV mail order market. However, *judging Capitol's actions from the standpoint of the time in which these actions were taken* I must conclude that a record company such as Capitol would be justifiably concerned about maintaining a $6.98 suggested retail price in the face of Levy's $4.98 price. *Capitol's action in the face of this competition was reasonable and necessary.*" (A. 3464) (emphasis added)

To appreciate the reasonableness of Capitol's efforts to reduce its losses by reduction of its prices, Capitol's actions must be viewed, as was done by Judge Griesa, in the light of the realities with which it was confronted at the time it made its decision. C. McCormick, Damages §35, pp. 133-36 (1935)

1. Capitol's Knowledge

(a) Capitol knew that historically the advertised price of mail order albums ranged from $3.88 to $4.98. It did not know with any certainty that the "Roots" album would be offered for sale at $4.98 (A. 2577-78, 2686, 2694, 2699, 2978-79).*

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* Adam VIII and Levy totally ignore both the Zimmerman and Posner testimony on this point. Instead, they desperately latch on to one fragment of Menon's testimony to try to argue that Capitol, at the time of its decision to reduce its suggested retail price, knew without any doubt that "Roots" would be offered at $4.98 (Levy Brief, p. 41). However, the thin reed of Menon's testimony on this point will not support the weight of their argument. First, their characterization of Menon as "the man who made the decision to cut the price" (*Id.*), is misleading. Zimmerman testified that the decision was made " . . . in concert. There were a number of us who discussed it. I think Mr. Menon had the final approval, the go-ahead." (A. 2699) Second, what Menon said was:

> "But the primary determinate of the 5.98 price which was one dollar lower than our prevailing, still prevailing, recommended retail price, was the fact that the Roots album we had reason to believe was due to be advertised and offered to the

(b) Capitol had no reason to believe that "Roots" would be sold exclusively by mail order. Accordingly, although Capitol might have known that the advertised price for mail order purposes was not subject to discounting, it had every reason to believe—and did believe—that if sold through retail stores (A. 2689), the price of "Roots" was not fixed, but, as with retail sales of Capitol's own albums, subject to the discretion of the retailer to "set his own price."* (A. 2691)

(c) Perhaps the most important fact known to Capitol—and the one not discussed by Levy and Adam VIII—is that Capitol does not sell at the retail level; 30% of its sales are to retail stores, and 70% of its sales are to rack jobbers (A. 2694).

2. Capitol's Need To Compete at the Wholesale Level

The suggested retail price determines the wholesale selling price Capitol charges to its customers (A. 2682-83). The net wholesale price to Capitol's customers is $.49 lower on a $5.98 album than on a $6.98 album ($2.87 versus $3.36) (A. 2695-98). Thus, there is " . . . more opportunity for the retailers to discour ." when the suggested price is $5.98,

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public for sale on television or through television at 4.98." (A. 2383)

When Levy's and Adam VIII's counsel sought on cross examination of Zimmerman to make more of this statement than there is, Zimmerman made this cogent observation:

> "I think Mr. Menon knowing that the record Roots album did eventually come out at $4.98 was referring to that. . . . " (A. 2700)

Obviously, Judge Griesa, who heard Menon's testimony live and in context, agreed.

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* Whatever the propriety of the evidence concerning the price of records sold at "Jimmy's Music World", (Levy Brief, p. 42), it is clear that Judge Griesa attached little, if any, significance to it, and Zimmerman's testimony concerning Capitol's belief that "Roots" could be discounted by retailers is "competent proof", sufficient to sustain Judge Griesa's findings, without reliance on the evidence of "Jimmy's Record World" prices.

because ". . . their net wholesale price is lower. It gives them an opportunity to sell the product at a lower retail price and maintain the same [profit] margin". (A. 2578, 2579)

As Zimmerman testified, at the time the decision to reduce the price was made "[w]e were working not knowing what the price of the Roots album would be, not knowing how *our customer* would react to knowing [of Roots] just being there, *of Adam VIII being able to go through fulfillment center or any means that they chose, to go directly to even a Korvette* . . . ." (A 2696-97) (*See also*, A. 2591-92) In other words, Capitol had not only to consider competition at the consumer level but also at the wholesale level. The very real $.49 per album reduction of this wholesale price was intended to encourage *Capitol's customers* to buy the Capitol album.* Even if one were to assume that Capitol knew the retail price of "Roots" with certainty—which it did not—there can be no question that Capitol did not know the wholesale price of "Roots" (A. 2697).

3. Competition on the Retail Level

Because 70% of Capitol's records reach retailers through rack jobbers, these retailers must pay, on a $6.98 album, between $4.10 and $4.30 per album, as opposed to the $3.36 per album price Capitol charges to the rack jobbers and large retailers, such as Sam Goody (A. 2695). And, whereas Sam Goody might be able to discount a $6.98 record below $4.79, 70% of the Capitol retailers would have to sell a $6.98 album for "4.79, in that area, or higher." (A. 2696) It is disingenous for Levy to suggest, as he does, that the nineteen cent differential between a discounted selling price for a Capitol $6.98 album and the $4.98 price for "Roots" represents a sufficient economic incentive to a consumer to be choice-determinative in deciding between purchasing

* Judge Griesa, upon hearing Zimmerman's testimony concerning wholesale prices, recognized its significance and attempted unsuccessfully to help Levy's counsel focus on it (A. 2698).

Capitol's album or "Roots".* It is patently obvious that if "Rock 'n' Roll" was to compete on a price basis with "Roots", at the consumer level, the one dollar reduction in the suggested retail price was a necessity—and, based upon the facts then known to it, Capitol's action was eminently reasonable.

Having determined the extent of Capitol's lost sales on "Rock 'n' Roll" and having found Capitol's $1.00 price reduction to have been reasonable, Judge Griesa merely had to perform simple arithmetic** to arrive at the damages suffered by Lennon (A. 3473-74).***

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* As it turned out, "Roots" contained two songs—"Be My Baby" and "Angel Baby"—not on the Capitol album. Although the recording of these two songs was aesthetically unacceptable, this fact would not be known to the consumer at the time of purchase and the prospect of getting two additional songs could well outweigh a nineteen cent price differential.

** The Court, in giving Levy and Adam VIII the benefit of any doubt, averaged Lennon's per album and tape royalty rate (68¢ and 64¢, respectively) and then multiplied the mean figure of 66¢ times 100,000 to arrive at Lennon's damages resulting from the lost sales (A. 3473).

Similarly, on the damages awarded for the one dollar price reduction the proportionate royalty ($.10) on one dollar was multiplied times 457,000 units actually sold (A. 3473-74).

When, on Adam VIII's and Levy's post-trial motion to amend the findings, Judge Griesa indicated he would permit them to reopen their case to put in evidence of American Federation of Musicians deductions, Lennon, in order to avoid further protracting the litigation and without admitting that such payments were or would be owed by him, stipulated with Levy and Adam VIII to a reduction in his damage award in the amount of $9,400 (A. 4273-75).

The method of calculating Lennon's damages is one of the few actions taken by the District Court which plaintiffs and Levy have not challenged on this appeal.

*** While it is abundantly clear from Levy's past legal and commercial chicanery and continued sale of "Roots" in October 1975 that defendants are entitled to an injunction in the form issued by the District Court, Levy, Adam VIII and Big Seven may not, in any event, seek its dissolution on this appeal. The injunction by its terms runs in favor of *all* defendants and as plaintiffs and Levy have irrevocably withdrawn their appeal against Capitol and EMI (*see* note, p. 2, *supra*), Capitol's and EMI's right to injunctive relief has been permanently fixed. Accordingly, this Court cannot, consonant with fundamental principles of due process, take any action with respect to the injunction, for to do so would necessarily affect the rights of Capitol and EMI, parties not before this Court.

In summary, each of the specific attacks which Levy makes on the evidence of (a) Capitol's decision to rush the release and distribution of "Rock 'n' Roll", (b) Capitol's decision to reduce the suggested retail price, (c) the confusion and disruption caused by the advertisement and sale of "Roots", (d) the causal relationship between the rush, price reduction and confusion and Levy's and Adam VIII's tortious conduct, and (e) the damages caused to Capitol and Lennon, are demonstrably without merit.

IV

The Award to Lennon of $35,000 in Compensatory Damages on His Section 51 Claim Was Supported by Overwhelming Evidence

Unable to deny their flagrant violation of Lennon's rights under New York Civil Rights Act §51,* Levy and Adam VIII attack the award to Lennon of $35,000 in compensatory damages on this counterclaim by making the incredible assertion that "Lennon's proof of injury to his reputation consisted of some general testimony. . . ." (Levy Brief, p. 43) In fact, the record contains overwhelming evidence that the poor appearance of the record jacket, the sound quality, musical content, packaging and marketing of "Roots" caused injury to Lennon's reputation and damaged him as an artist.** The District Court's findings are at A. 3481-82.

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* See Addendum for full text of §51.

** Levy and Adam VIII attempt to divert the Court's attention from this evidence by references to the "Two Virgins" album, which they say was "obscene and vulgar," and "an album cover related to his drug arrest," and arguing that Lennon's "reputation is virtually impervious." While we respond in detail to these claims below, counsel for Levy and Adam VIII cannot be seriously advancing these contentions again for they are identical to those presented to the District Court and completely nullified when their attorney, in court and while he was cross-examining Lennon about this "obscene and vulgar" album cover, asked Lennon to autograph the album cover (A. 1951).

As Levy acknowledges Lennon testified that the photograph used on the cover of "Roots" was "cheap and vulgar" (Levy Brief, p. 43), not only "because it was a fuzzy enlargement" (*Id.*), but because it was "a horrible photograph" (A. 3325), and a "lousy picture of me" (A. 1944). The entire album cover itself was described by Lennon and other witnesses as "crummy" (A. 1949), "dreadful" (A. 3160), "appalling" (A. 2521), and "poor" (A. 2600):

> ". . . This is nothing like anything I have produced myself. . . . It [is] just a lousy cover, and the colors, I don't like. I would not allow Capitol to advertise other artists' records on my cover. This is like endorsing whatever these other packages are. It is just not a good looking album". (A. 972-73; *see also* Menon, A. 2405-06)

David Marsh testified: "People just don't do covers like that . . . the colors are nothing less than garish. It looks thrown together." (A. 3269)

The "crummy" cover of "Roots" was particularly offensive given the importance of album covers and packaging. Lennon testified that "nowadays the audience . . . expects to get a decent cover, and artists like myself quite often include things inside, like posters and games. . . . Your cover is as important as the music." (A. 976) Menon testified similarly about the importance of album covers (A. 2477).

Furthermore, as Marsh testified, John Lennon and the Beatles were ". . . one of the first groups in rock and roll to sort of raise album cover art to the point where design societies now publish books about album cover art . . . the Beatles really initiated that." (A. 3269) With their "Sergeant Pepper's Lonely Hearts Club Band" album (DX CB-2), the Beatles introduced the first "conceptual album" —an album which was a complete artistic unit ". . . designed to project a single theme, a single idea . . .". (Marsh, A. 3225)

To achieve their artistic goal, the Beatles took complete control of the cover and packaging of "Sergeant Pepper", making use of "incredibly detailed depiction[s]" (A. 3225) and even going to the extent of forcing EMI to pay the high costs of hiring "fairly well known artists to do designs" for the album (A. 976; *see also* DX CB-1, CB-3 and CB-4, three other Beatles albums).*

Lennon, in his solo career, continues to demand very high "standard[s] of quality . . . with respect to his own albums" (Griesa Opinion, A. 3481) and stays closely involved in developing the packaging art and graphics for his releases (A. 2476-77, 2599) in order to achieve the artistic effects he desires (*see, e.g.,* A. 976, lines 11-13, 22-24). In addition, Lennon continues to put out artistically unified, "conceptual albums" (Marsh, A. 3230). As with "Sergeant Pepper" these are releases in which album cover art—including such things as drawings, moving figures and quotations—is an integral part of the total artistic statement being made by Lennon (*see, e.g.,* A. 976, lines 11-14, A. 978, lines 22-25; A. 3007, line 23; A. 3008, line 24; A. 3019, lines 2-7).**

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* Lennon testified that by their third or fourth album, the Beatles "made all the decisions, including the cover of the album, what was written on it, just everything to do with the production and even the selling and the ads in the papers—we controlled everything artistic about the albums." (A. 636-37; *see also* 975-76)

** "Two Virgins" was such an artistically unified album. As Lennon testified, "Two Virgins" was an avant-garde album (A. 3169), the cover (PX 3A) of which was based upon and which quoted from the Book of Genesis, Chapter 2, Verses 21-25, *inter alia:* "And they were both naked, the man and his wife, and were not ashamed." Through this album Lennon attempted to make an artistic statement—that he had nothing to hide, that "underneath all the facade and image, I look like everyone else. . . ." (Lennon, A. 1953) The "Two Virgins" album was a truly integrated work of art which utilized nudity in expressing its message, much as nudity has been used in art for thousands of years. As Lennon testified:

> ". . . I do not think it is bad taste to be naked, otherwise every artist for the last 2000 years would be on trial for nakedness or having to do with naked bodies." (A. 1950)

[Footnote continued on next page]

Lennon also insists on the highest standards of quality and artistic design in the television commercials advertising his albums (*see, e.g.,* A. 924-26, 3133-37, DX CZ) and the District Court viewed four of Lennon's commercials (A. 2839-41). This is much in contrast to the "cheap-looking" (A. 3160), "lousy" (A. 972), "atrocious and ugly and cheap" (A. 3145) television commercials for "Roots", which the District Court had an opportunity to observe (A. 2841, PX 103). The "Roots" commercials—which utilized, without authority and for advertising purposes, several unflattering photographs of Lennon in addition to showing the album cover (A. 3160-61)—were "worse than even the normal commercials for those [television mail order] packages, which are generally bad" (A. 971) and were widely seen throughout the United States on the "Roots" commercials.

There was also "convincing evidence that the quality of the music in the Roots album was of a standard not tolerated by Lennon." (Griesa Opinion, A. 3481) Testimony of technical deficiencies in "Roots" was given by Lennon and Marsh (*see, e.g.,* A. 990, 992, 3141-42, 3257, 3258). Marsh testified that the sound of the "Roots" album was "shoddy . . . fuzzy (A. 3236) and that "*. . . the sound quality is simply inexcusable*". (A. 3236-37)** (emphasis added)

[*Footnote continued from previous page*]

Similarly, the photographs on the cover and back of "Unfinished Music No. 2: Life With The Lions" (PX 228) were chosen "because they are of the period and about what is inside the record . . . they have a relationship with what is inside the record." (Lennon, A. 3165) Contrary to Adam VIII's and Levy's misrepresentations, *Lennon specifically testified that the picture on the back of the album* [not the cover (A. 3165)], *was not a picture of a drug arrest* (A. 3162, 3164). When asked on cross-examination to compare *some other photograph* with the back of the album and whether they were pictures of "the same scene," Lennon testified that the difference between the two photographs is "the difference between Mona Lisa smiling and Mona Lisa not smiling." (A. 3162-64)

** *See also* PX 340 at E 200 which is a copy of Marsh's letter analyzing in detail the differences between "Rock 'n' Roll" and "Roots." Levy and Adam VIII objected to its introduction by Lennon (A. 3234) but then introduced it as their exhibit.

Marsh further testified that the surface noise on "Roots" interfered with the "specific musical effects" Lennon was trying to create in recording an album of songs from a prior era (A. 3238), and that consequently, the music on "Roots" lacked "presence" (A. 3239).

Even more damaging—"Roots" contained two tracks that were scrapped by Lennon for the Capitol release because they were "atrocious" (A. 918-19). They were, as Marsh testified, "so badly out of tune that John isn't even singing in the same key as the band" (A. 3248; *see* A. 3142, 3256), and *all* of the tracks on the album are not in the correct order, which Lennon testified was very important (A. 683-85, *see* A. 3257-58).

After listening to "Roots" and "Rock 'n' Roll", Judge Griesa observed:

> "I don't think there is any comparison. The Rock and Roll is so much clearer; the v[o]ice was very poor and indistinct on Roots, it was almost hidden there. I could not tell it was John Lennon singing or anybody singing; it was a voice. The elements, whatever they are, were all fuzzed up in Roots, and I don't know whether you call it surface noise or what kind of noise, but it was fuzzy, and I would not get anything much of it. Now, the Rock and Roll, it seems to me, the vo was clear and distinct, and every other element was distinct, and the beat was distinct, and the different things that had very little impact of any clarity on the Roots album, were clear, and that is that." (A. 3241-42)

The impact on Lennon's reputation of this "crummy", "shoddy"-sounding "Roots" album, along with its "atrocious and ugly and cheap" commercials, was substantial. Lennon testified that he was "embarrassed" by an album which could be copied "as many times as they want" and which damaged his reputation as an artist (A. 994-96, 3145). As Judge Griesa found: "There is no doubt in my

mind that this situation has caused damage to Lennon's reputation and has produced some damage to him as an artist." (A. 3481-82)

Marsh testified that the "overall shoddiness of the ["Roots"] venture" would make one wonder whether Lennon "care[s] any more" about his art and the product he puts out (A. 3268-69). Zimmerman testified that "because of the poor quality of the cover, of the advertising [of "Roots"], and I think of a demeaning nature of almost the status of the artist's product . . ." (A. 2600), Lennon was demeaned as an artist by the "Roots" album (A. 2601; *see* A. 2600).*

And Lennon's reputation is highly susceptible to injury. Lennon's fans are people "whose loyalty . . . can be very fickle". (Marsh, A. 3254) Nevertheless, for the sake of his art, Lennon has engaged in a number of artistic experiments—releasing commercially doubtful but artistically sound avant-garde albums (*see* A. 3168-70, 3172, 3173, 3178-79), and taking other artistic risks with more commercial albums (*see, e.g.*, Marsh, A. 3229-30). But Levy and Adam

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* Adam VIII and Levy try to make much of the lack of commercial success of "Roots" (the album sold 1,270 copies). Regardless of the number of albums actually sold, there was convincing evidence that the impact of "Roots" was substantial. It is clear that "[t]he TV advertising occurred and was seen undoubtedly by far more than 1,270 people." (Griesa Opinion, A. 3482-85) Indeed, the "atrocious" "Roots" commercials were seen in 24 major American cities—by millions of people (*see* POINT III, *supra*). Furthermore, as Marsh testified:

> ". . . you are dealing with a person [Lennon] whose popularity rises and falls on word of mouth.
>
> ". . . the 1,270 is not a realistic figure. People play records for one another, and, particularly with anybody associated with the Beatles, people go out and bootleg records . . . . I think there is great chance that many more, obviously, people, over a period of time, the effect can be significant.
>
> • • •
>
> "People play these things for their friends; they play them at parties; that is what it is all about, anyway." (A. 3261-62)

There was also testimony that "Roots" was already a collector's item (*see* A. 996, 3262-63, 3265).

VIII forced upon Lennon unwanted and extremely dangerous risks. By releasing "Roots"—an album which was really only the rehearsal of a final production (A. 991, 3146)—Adam VIII and Levy made Lennon responsible for a shoddy album (*see* Lennon, A. 3146, lines 21-22) which is especially likely to put off Lennon's fans by making them question Lennon's whole future (A. 3254). Given this evidence of Lennon's career, Judge Griesa found:

> "*. . . this means in my view . . . that Lennon's reputation and his standing are a delicate matter and that any unlawful interference with Lennon in the way that Levy and the Roots album accomplished must be taken seriously*". (A. 3482-85) (emphasis added)

Marsh testified that the "Roots" release of "Angel Baby" and "Be My Baby" was extremely embarrassing to Lennon's reputation as an artist (A. 3257). Marsh explained that "Be My Baby" was a rock and roll classic (A. 3255-56) that had a close association with Lennon's career (A. 3257). Accordingly, the "Roots" release of "Be My Baby" makes Lennon look: ". . . like the man trying to recreate his own work and he simply not only can't do it but he is literally incompetent. It is just incompetent. And it is very embarrassing." (A. 3256; *see also,* A. 3257) *See generally,* A. 994, 996, 3145, 3146.

But it was Menon who best summed up the "seriously prejudicial effect [of "Roots"] on Mr. Lennon", and best described the way in which "Roots" "denigrated the image of the artist" (A. 2521):

> ". . . *to repeat, I believe the very existence of* [the "Roots" package] *and the fact that it was so offered through this particular means of marketing, has done* [Lennon] *severe damage.*" (A. 2405-06) (emphasis added)

Thus Lennon's reputation was substantially damaged by "Roots", and compensatory damages for this injury to repu-

tation were indisputably proper. *Time, Inc.* v. *Hill,* 385 U.S. 374, 384-385 ...9 (1967); *see Russell* v. *Marboro Books,* 18 Misc.2d 166, 183 N.Y.S. 2d 8 (Sup. Ct. N.Y.Co. 1959); *Metzger* v. *Dell Publishing Co.,* 207 Misc. 182, 136 N.Y.S. 2d 888 (Sup. Ct. N.Y.Co. 1955).

But even assuming, *arguendo,* that Lennon's reputation was not damaged by "Roots", Levy's and Adam VIII's violation of Lennon's right of privacy by issuance of "Roots" would nevertheless require that the compensatory damage award to Lennon be affirmed. Two independent theories* each require such affirmance:

(1) Right of publicity

Lennon is entitled to recover the fair market value of the use of his name, picture and reputation by Adam VIII and Levy in promoting and selling "Roots" (as well as promoting those records advertised on the back of the "Roots" cover). *See Grant* v. *Esquire, Inc., supra; Price* v. *Hal Roach Studios, Inc.,* 400 F.Supp. 836, 843 (S.D.N.Y. 1975); *Haelen Laboratories* v. *Topps Chewing Gum,* 202 F.2d 866 (2d Cir.), *cert. denied,* 346 U.S. 816 (1953); *Booth* v. *Curtis Publishing Company,* 15 A.D.2d 343, 223 N.Y.S.2d 737, *aff'd* 11 N.Y.2d 907 (1962). This fair market value is a substantial amount of money both because of Lennon's prominence, and because neither Lennon nor the Beatles, despite numerous offers, had ever endorsed products other than their own, authorized works (A. 3149-50), much less on the back of one of their album covers (A. 973). *See Grant* v. *Esquire, Inc., supra,* 367 F.Supp. at 881. Evi-

* There was overwhelming evidence that "Roots," its "dreadful" cover, its "cheap" marketing, and its cacophonic music caused Lennon a great deal of embarrassment—greatly upset him (*see e.g.* A. 3145-46, 3148, 3160-61, 973, 994, 996). This injury to Lennon's feelings—disturbing his peace of mind and causing him mental distress—is sufficient—in and of itself—to require affirmance of the District Court's award of damages under §51. Time, Inc. v. Hill, *supra;* Manger v. Kree Institute of Electrolysis, 233 F.2d 5, 9 n. 5 (2d Cir. 1956); Grant v. Esquire, Inc., 367 F.Supp. 876, 881 (S.D.N.Y. 1973).

dence at trial showed that a $100,000 offer was clearly insufficient to obtain Lennon's endorsement of a product (A. 3151).

(2) Property interest inherent in Lennon's personality

Since Lennon's statutory right of privacy was invaded, he is entitled to compensation for injury to his property interest inherent and inextricably interwoven in his personality, which in the case of a well known musician like Lennon, is Lennon's interest in his performance, music, name and likeness. *See, Manager* v. *Kree Institute of Electrolysis, supra; Gautier* v. *Pro-Football, Inc.,* 278 App. Div. 431, 438, 106 N.Y.S.2d 553, 560 (1st Dept. 1951), *aff'd.* 304 N.Y. 354 (1952), *citing Redmond* v. *Columbia Pictures Corp.,* 277 N.Y. 707 (1938); *Myers* v. *U.S. Camera Publishing Corp.,* 9 Misc.2d 765, N.Y.S.2d 771 (Cty. Ct. N.Y. Co. 1957). Thus, in *Grieseking* v. *Urania Records,* 17 Misc.2d 1034, 155 N.Y.S.2d 171 (Sup. Ct. N.Y.Co. 1956), the court, in evaluating the sufficiency of a cause of action brought by a musician under §51, against a record company which produced and sold unauthorized record albums—made, as here, from an unauthorized tape recording of one of the musician's performances—held:

> "A performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not represent his service." 155 N.Y.S.2d at 172.

Given the substantial injury to Lennon's reputation caused by "Roots", and the several other bases of Lennon's recovery under §51, the $35,000 awarded to Lennon on this counterclaim seems small indeed.* Yet, Levy and

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* It is interesting that in Grant v. Esquire, Inc., *supra,* where trial counsel for Levy and Adam VIII represented Cary Grant in an action under §51, Grant asked for compensatory damages of $3,000,000 and punitive damages of $1,000,000 as recovery for infringement of his right of privacy on grounds very similar to those set forth by Lennon in the present case. Moreover, in Binns v. Vitagraph Co. of America, 147 App. Div. 783, 132 N.Y. Supp.

Adam VIII argue that even this award should be denied because the exact amount of damages to be awarded for invasion of Lennon's right of privacy is difficult to ascertain. This very argument was answered by this Court in *Manger* v. *Kree Institute of Electrolysis, supra.* In *Manger,* despite the absence of definite proof of damages, this Court affirmed a holding that the damages awarded below were not excessive, 233 F.2d at 9 n.5, noting:

> "The fact that in cases involving infringements of the right of privacy the damages may be difficult of ascertainment or cannot be measured by a pecuniary standard is not a good ground for denying recovery at all."

Accord, Myers v. *U. S. Camera Publishing Corp., supra.*

V

Punitive Damages Were Properly Awarded to Lennon

Levy and Adam VIII never discuss the appropriate standards for awarding punitive damages under New York Civil Rights Law §51—the primary basis for the award of punitive damages to Lennon—or even the correct punitive damage standard for the common law claims. Rather, after discussing the standard for awarding punitive damages in actions involving fraud and deceit, Levy and Adam VIII conclusorily claim that the statutory standard under §51 is "the same" (Levy Brief, p. 54).

Recently, in *Garrity* v. *Lyle Stuart, Inc.,* 40 N.Y.2d 354, (1976) (Breitel, C.J.) the New York Court of Appeals distinguished the standard for awarding punitive damages in common law situations, such as that of *Walker* v. *Shel-*

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237 (1st Dept. 1911), aff'd 210 N.Y. 51 (1913), the appellate court reinstated, as not excessive, a jury award of $12,500 to a telegraph operator whose rights under §51 were violated. If in 1911 a telegraph operator was entitled as a matter of law to $12,500, then surely the $35,000 awarded to Lennon is not excessive.

don, 10 N.Y.2d 401 (1961), so heavily relied upon by Levy and Adam VIII, from the applicable standards where, as here, a statute provides for recovery of punitive damages.

Under §51, exemplary or punitive damages are awarded where the defendant knowingly violates plaintiff's right of privacy; *Grant* v. *Esquire, Inc., supra,* 367 F. Supp. at 881 n.3; where defendant acts in "bad faith", *Price* v. *Hal Roach Studios, Inc., supra,* 400 F.Supp. at 847 n.20, or where the violation of plaintiff's right of privacy is the result of defendant's reckless or grossly negligent behavior. *Myers* v. *U.S. Camera Publishing Corp., supra,* 167 N.YS.2d at 773-74. *Cf. Roberts* v. *Conde Nast Publications,* 286 App. Div. 729, 146 N.Y.S.2d 493 (1st Dept. 1955). If Levy and Adam VIII knew or should have known that they were using Lennon's name, picture and music without proper authority,* punitive damages were properly awarded to Lennon by the District Court. *See Myers* v. *U.S. Camera Publishing Corp., supra.*

The facts of the present case show beyond any doubt that an award to Lennon of punitive damages under §51 was appropriate. As fully set forth in the Counterstatement of Facts and POINT II, *supra,* no oral contract was entered into between and among Lennon, Apple, Levy and plaintiffs granting Levy and Adam VIII distribution rights to an album of Lennon's recordings, and thus, no agreement, "tentative" or otherwise, was entered into granting Levy and Adam VIII the right to use Lennon's name and likeness in marketing a record album.** The record further shows

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* Levy and Adam VIII were warned by the photographer from whom the photos of Lennon were purchased that it was their responsibility to obtain his permission (DX AG at E 282).

** Levy and Adam VIII concede, as they must, that they did not receive *written* permission to use Lennon's name and likeness as required by §51. And since Lennon clearly did not "sell or dispose of" the 7½ ips tape recording he gave to Levy by making use of his (Lennon's) "name, portrait or picture," the exception in §51 cited by Levy and Adam VIII (Levy Brief, p. 56) is of no help to them.

that Levy advertised and sold "Roots" after being told by Seider that he had no right to do so and after receiving telegrams from Lennon and Capitol to the same effect. Accordingly, Judge Griesa based his punitive damage award to Lennon not only on his finding that:

> "the issuance of the Roots album by Levy did constitute a wilful act in conscious and wilful derogation of the rights of Capitol, EMI and Lennon" (A. 3574),

but on the further finding that:

> "Levy knew that Lennon and Apple had contractual responsibilities to EMI and Capitol. Levy never bothered to ask to see a contract, never instructed his lawyers to look at contracts.
>
> "Levy claims to have relied on materials such as quotes in Playboy Magazine and opinions offered by Alan Klein, the former manager of the Beatles, as to his asserted right to distribute a Lennon album. ***But this was a complete and reckless disregard of the rights of Capitol, EMI and Lennon.***
>
> "***Levy had absolutely no basis for believing that he had the legal ability to issue this album, and I cannot in all realism believe that he even thought that he had such right.***" (A. 3474) (emphasis added)

Even the punitive damage awards based solely upon the common law claims—such as those to Capitol and EMI—were proper. *Walker* v. *Sheldon, supra,* the leading New York decision in the punitive damage area, set forth two rules for awarding punitive damages. The Court of Appeals first enunciated the standard under which punitive damages are generally to be awarded:

> "[p]unitive or exemplary damages have been allowed in cases where the wrong complained of is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the defendant but to deter him, as well as others who might otherwise be so prompted,

> from indulging in similar conduct in the future." 10 N.Y.2d 404.

This standard was recently reaffirmed in *Garrity* v. *Lyle Stuart, Inc., supra,* and is generally relied upon. *See, e.g., Rupert* v. *Sellers,* 48 A.D.2d 265, 368 N.Y.S.2d 904 (4th Dept. 1975). Under this standard, Levy's "complete and reckless disregard of the rights of Capitol, EMI and Lennon" clearly makes the instant case an appropriate one for an award of punitive damages. *See Villeneuve* v. *Roulette Records, Inc.,* No. 68-2128 (S.D.N.Y. July 31, 1975) (slip op. at 19-22).

Walker v. *Sheldon* enunciated a second, far more restrictive standard for awarding punitive damages in causes of action involving fraud and deceit, allowing recovery " . . . where the fraud, aimed at the public generally, is gross and involves high moral culpability." 10 N.Y.2d at 404. Levy quotes the above rule out of its proper context, and relies upon this fraud and deceit standard and a line of cases decided thereunder (the cases cited at pages 52-53 of the Levy Brief) in attempting to state the rule for awarding punitive damages in the present case. However, since Lennon did not allege or recover damages for fraud and deceit, and punitive damages were not awarded to him on that basis, the rule stated by Levy is simply inapposite. Rather, the correct rule for awarding punitive damages on the common law claims of the present case is the non-fraud standard enunciated in *Walker* v. *Sheldon* and reaffirmed in *Garrity* v. *Lyle Stuart, Inc.*

As for the amount of the punitive damage award, Judge Griesa specifically stated that he awarded only "moderate" punitive damages in light of the compensatory damages awarded (A. 3174).* Moreover, it is well established that:

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* On the fraud claim alleged by plaintiffs herein they sought punitive damages of $15,000,000 (A. 23a).

> "The allowance of punitive damages and the amount are within the discretion of the trier of the facts, who has seen the witnesses and had all the facts before him."

Szekeley v. *Eagle Lion Films*, 140 F. Supp. 843, 850 (S.D. N.Y.), *aff'd.* 242 F.2d 266 (2d Cir. 1957); *see Myers* v. *U.S. Camera Publishing Corp., supra*, 167 N.Y.S.2d at 744.

Under all of the facts of the present case, the $10,000 awarded to Lennon as punitive damages is clearly reasonable and appropriate.

VI

Capitol and Lennon Exercised Reasonable Care to Avoid Damages Despite No Legal Obligation to Do So

Before considering the facts pertinent to Levy's claim that Capitol and Lennon did not do enough to protect their interests, it is necessary to examine the doctrine of avoidance of consequences in somewhat greater detail than offered by Levy.

Section 918(1) of the Restatement of Torts, quoted at page 46 of the Levy Brief, specifically speaks only of the avoidance of such harm as occurs "*after the commission of the tort.*" (emphasis added) The Restatement finds ample support among the cases and the commentators. *See, e.g., Barry* v. *Coca Cola Co.*, 99 N.J. Super. 270, 239 A.2d 273, 276 (1967); W. PROSSER, Law of Torts §64, p. 433 (3d ed. 1964).

Professor McCormick has stated the rule in terms particularly apposite to the situation herein presented:

> "It is only damaging *consequences* of past wrongful conduct that must be avoided or minimized by the victim. The policy against aiding a wrongdoer to exert by a mere threat pressure upon other persons to mold their conduct on his desires prevails over the policy of keeping economic losses at a minimum." C. MCCORMICK, DAMAGES §33, pp. 137-38 (1935)

And, in *Pearlstein* v. *Scudder & German*, 346 F. Supp. 443 (S.D.N.Y. 1972),* the Court properly noted:

> "It is axiomatic that in order to have a duty to mitigate damages, one must recognize that he has been damaged. It would have to appear that he knew, or should have known that a tort had been committed against his property, and that he has been damaged as a result of that tort in order to be placed under the duty to mitigate." 346 F. Supp. at 452.

In *Den Norske Ameriekalinje Actiesselskaket* v. *Sun Printing and Publishing Association*, 226 N.Y. 1 (1919), a frequently cited opinion, New York's highest Court drew a sharp distinction between situations involving breach of contract and negligence and those which "involve instances of intentional injury to or invasion of the rights of person or property." 226 N.Y. at 9. The Court then stated: ". . . we are not inclined to hold that there was imposed upon . . . [the injured party] an obligatory burden to endeavor to avert its [the intentional tort's] injurious consequences." 226 N.Y. at 9.

The tortious conduct of Levy and Adam VIII was unquestionably conscious and wilful and, indeed, malicious. Thus, under New York law—law which on Capitol's and Lennon's non-federal counterclaims the District Court and this Court are bound to follow—there was no duty to act even after Levy and Adam VIII perpetrated their torts.

However, even if Capitol had a duty to avoid such harm as it reasonably could, this duty, as shown above, certainly did not arise "as soon as it learned of plaintiffs' contentions" (Levy Brief, p. 49), and it is completely irrelevant whether Capitol learned of Levy's evil intentions on January 30, February 6 or February 7, 1975—the only

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* *Pearlstein* was reversed on appeal to this Court (527 F.2d 1141 (2d Cir. 1975)); this Court did not challenge the District Court's statement of the doctrine of avoidance of damages, but did state its inapplicability to the particular facts therein presented. 527 F.2d at 1145.

relevant date is that upon which defendants first learned that Levy's intentions had been converted to action.

The television advertising for "Roots" began, according to plaintiffs' Amended Complaint, ¶22 (A. 14a) on or about February 8, 1975 and, thus, this is the time when the tort was first committed, and when, assuming there was any duty to act, such duty first arose.

Levy makes much of the fact that Seider did not inform Capitol about the January 9, 1975 letter (PX 31 at E 30) wherein Levy first enunciated his discredited claim to "world-wide" rights. However, since it would be immaterial on the issue of damages were Seider to have informed Capitol of Levy's outlandish claim, *a fortiori*, it is equally immaterial that Seider omitted to do so.*

What is very relevant is that even though there was then no duty to act, Capitol, together with Lennon, did in fact act, as early as January 31, 1975—the day after Seider, who had been keeping Levy apprised of *all* developments with Capitol (*see* pp. 30-33, *supra*), told Levy that he could not put out a Lennon album (A. 1266-73). Meetings among Capitol representatives and Lennon and Seider were promptly arranged to discuss the situation (A. 2543-46), and Lennon went back into the recording studio on February 5, 1975 to complete the "mixing" necessary to prepare the "Rock 'n' Roll" album for production (A. 970, DX TTT at E 478-82). On February 7, 1975 Capitol sent a telegram to Levy advising of EMI's exclusive rights and putting Levy on notice that Capitol and EMI would

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* Levy quotes in full virtually every adverse statement made during the course of the trial by Judge Griesa on the matter of Seider's conduct. However, Judge Griesa, who was obviously displeased, nonetheless found that it was inappropriate to reduce the award made to Lennon. Clearly, Judge Griesa, who raised the mitigation question, *sua sponte*, concluded that Seider's failure to inform Capitol of the January 9th letter was legally irrelevant thereto, although relevant on defendants' motion for attorneys fees (A. 3475-76).

hold Levy responsible for all damages incurred by reason of the advertisement or sale of a Lennon album (A. 35a). That same day Capitol decided that it must, to avoid even greater damage, rush the release of the Lennon album (A. 2550-51). To make sure that Levy had not the slightest doubt, Lennon sent him a telegram advising that he had no authority to use Lennon's performances, name and/or likeness (DX CCCC E at 485). Additionally, telegrams were sent to television stations and Adam VIII's suppliers, advising that the Adam VIII album was unlawful and demanding that the stations not advertise and the suppliers not produce it (PX 41A-51P at E 31-46).*

Levy contends that the foregoing was insufficient—defendants, he says, "could have applied for a temporary restraining order and preliminary injunction." (Levy Brief, p. 50.) Even with the benefit of 20/20 hindsight, defendants' right to a temporary restraining order, much less a preliminary injunction, as of early February 1975, is dubious.

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* On the one hand Levy argues that Capitol did not act fast enough and on the other, complains that it acted too precipitously in deciding "to immediately release . . . ["Rock 'n' Roll'] at a lower price." (Levy Brief, p. 50) As discussed, *supra*, at note, p. 43, during the relevant period, Capitol could never be sure that the "Roots" commercials had effectively been halted. Indeed, Defendants' Exhibit AR (E 285) shows that the commercials continued to run up through February 17th, and in answers to interrogatories (DX AU at E 304) Levy stated under oath that sales of "Roots" were still being made as of October 14, 1975. Moreover, had Capitol not rushed the release and reduced the price of "Rock 'n' Roll," no doubt Levy would, as Judge Griesa observed, now be complaining that it should have done so (A. 3467).

As for the matter of whether Capitol could have at some point raised the price of "Rock 'n' Roll" from $5.98 to $6.98, we respectfully refer the Court to Zimmerman's testimony at A. 2705-08 and the full text of the transcript at A. 2511-13, which explains why Judge Griesa concluded that such a price change in midstream, on a single album, was impractical. Aside from the administrative impracticality, Capitol's understandable uncertainty over the length of time Adam VIII would continue to advertise "Roots" (A. 2653-55) meant that the occasion to consider a price increase on "Rock 'n' Roll" in time for it to make any economic difference never arose (*Id.*).

Consider the following language in *Yameta Co.* v. *Capitol Records, Inc.*, 279 F. Supp. 582, 585 (S.D.N.Y.) rev'd on other grounds, 393 F.2d 91 (2d Cir. 1968):

> "The foregoing amply illustrates that any determination of the issues of contract law must rest upon resolution of the many factual differences between the parties. Certainly, plaintiffs have not made any clear showing of their probable entitlement to relief, which is their burden in seeking a preliminary injunction. This court has no clear notion of which party has the exclusive right to Hendrix's [a recording artist] services, nor can it form such an impression until a trial on the merits. Inasmuch as the claim of unfair competition also rests upon the assumption that Yameta has a valid contractual right to Hendrix's performances, plaintiffs' motion for an injunction based on that cause of action also must fail."

Can there be any doubt that plaintiffs and Levy would not have thrown up this language in opposition to an application for an injunction by defendants? *See also Diamond* v. *Dougfield*, 159 N.Y.S.2d 750, 752 (S. Ct. 1956); *American Brands, Inc.*, v. *Playgirl, Inc.*, 498 F.2d 947 (2d Cir. 1974) (temporary injunction finally denied, after almost four months of litigation, partly on the ground that the plaintiff was obligated to avoid damages by commercial means *instead of seeking an injunction); Societe Comptoir de L'Industries Cotonniere Establissements Boussac* v. *Alexander's Department Stores, Inc.*, 299 F.2d 33 (2d Cir. 1962); *Flack* v. *United Artists Corp.*, 378 F.Supp. 637, 639 (S.D. N.Y. 1974); *Restaurant Associates Industries, Inc.* v. *Anheuser-Busch, Inc.*, 397 F.Supp. 1213 (S.D.N.Y. 1975).

Considering that it quite properly took twelve trial days for the District Court to be able to resolve the sharply disputed issue of whether an oral contract had ever been made, and that those twelve trial days were preceded by almost a full year of discovery proceedings, Levy's proposed scenario, which suggests that an injunction was available for the asking, is nothing short of a fairy tale.

The reason Levy offers no legal authority to support his argument that defendants were obliged to bring a lawsuit in order to mitigate damages is because there is none. Indeed, the only cases on point of which we are aware are to the contrary. *See Lipshie* v. *Lazarus,* 235 N.Y.S.2d 764 (S. Ct. N.Y. Co. 1962); *T. C. Bateson Construction Co.* v. *United States,* 319 F.2d 135 (Ct. Cl. 1963). These decisions are consistent with the traditional function of equity, which is to supplement rather than supplant available legal relief. It would be a total reversal of that relationship to deny legal relief to a tort claimant upon speculation that he may once have had an adequate equitable remedy.

In summary, Capitol and Lennon did all--and more—than the law required that they do to mitigate the harm inflicted by Levy's and Adam VIII's wilful and malicious conduct. They did act even before there was a legal duty to act, and the actions they took were not only prompt, but also realistic and reasonable.*

VII

Big Seven Is Not Entitled to Damages Over and Above the $6,795 Awarded by the District Court

The thrust of Big Seven's contention is that had Lennon recorded "Angel Baby", the third Big Seven song, "because of the interest generated by Lennon's version, other artists would have been induced to record the same song [such subsequent recordings are known as "cover" records], thereby generating additional royalties and enhancing the value of the copyright." (Plaintiffs' Brief, p. 49)

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* "[T]he standard of due care in determining liability in tort for negligence should be much stricter than the standard of reasonableness in choice of expedients to reduce or avoid damages applied against a person against whom a wrong has been committed." C. McCormick, Damages §35, p. 134 (1935); *see* Ellerman Lines, Ltd. v. The President Harding, 288 F.2d 288, 290 (2d Cir. 1961).

Big Seven's argument apparently is that Lennon is an important artist whose recordings other artists are eager to cover. Yet its main defenses to Lennon's and Capitol's counterclaims were that Lennon's individual albums did not sell well; that Lennon's career had gone downhill since the "Imagine" album; that the "Rock 'n' Roll" album is not a characteristic Lennon album and that its sales should not be judged by the sales of characteristic Lennon albums; and that the "Rock 'n' Roll" album received "devastatingly bad reviews." (Levy Brief, p. 12) However, on its claim of copyright enhancement, Big Seven's witnesses had nothing but praise for Lennon—obviously because that fit with its contention that Lennon's version of old rock and roll songs would be "covered" by other artists. While the evidence showed that Lennon is a writer, musician and performer of the highest stature, whose work has influenced an entire generation, the evidence showed even more clearly that his recording of a particular song would not have the magical effects suggested by Big Seven—indeed, the evidence demonstrated that it is the intrinsic musical quality of the song, not the artist performing it, which determines whether it will be "covered".

Big Seven's claim that other artists would have recorded "Angel Baby," or any other song, and generated significant amounts of income, because Lennon had recorded it, was disproven by its own exhibits. As the District Court, by way of understatement, said: "Big Seven's evidence turned out to have certain fatal defects." (A. 200a) Big Seven's exhibits PX 201B at E 156 ("Oye Como Va"), PX 202 at E 159 ("Daddy's Home"), PX 203 at E 164 ("Maybe") and PX 204 at E 169 ("My Boy Lollipop") were introduced ostensibly to provide the District Court with a basis for calculating damages, and it is clear that these songs were selected from the 20,000 songs in the Levy catalogues (A. 3653-54, 3665) because they were the

best examples Big Seven could find. However, it soon became clear that in each of these exhibits the earnings from the Santana, Germaine Jackson, Millie Small and Janis Joplin recordings (the "key" recordings equivalent to Lennon's in this case) had not been separated from earnings attributable to recordings made prior thereto (which are irrelevant) and to recordings subsequent to the key recordings and inspired by them (*i.e.*, the relevant "cover" records) (A. 3581-82, 3586), and that the exhibits did not separately indicate the additional royalties over and above the royalties earned from the key recording artist (Santana, *et al.*), *i.e.*, the royalties from cover records.

When with great reluctance Big Seven finally proffered the breakout for cover record royalties, and they were introduced into evidence over Big Seven's relevancy objection (A. 3943, DX EN at E 448, EO at E 453, EP at E 462 and EQ at E 472), they showed that practically *none* of the income was attributable to recordings *after* Santana, *et al.* Leo Strauss, Lennon's expert witness, compared DX EN with PX 204, DX EO with PX 202, DX EP with PX 203, and DX EQ with PX 201 in his testimony (A. 4017-32). Without reviewing each song, PX 201 dealing with "Oye Como Va" is illustrative of the complete failure of Big Seven's proof on this issue. PX 201 showed gross domestic mechanical royalties of $125,600. DX EN analyzed $122,600 of that amount and showed that $119,600 of the $122,600 was attributable to Santana and only $2,700 to recordings (cover records) made subsequent to Santana's (A. 4032). Even Big Seven's counsel agreed with the Court's observation (A. 4027) that DX EO ("Daddy's Home") showed that with respect to recordings after the Germaine Jackson version of that song the royalties were "peanuts" (A. 4028), and he then attempted to abandon PX 201 through PX 204 when the only song of "substance" he could refer to in response to an inquiry from the Court was "Close to You" referred to by Mr. Bienstock in his testimony (*Id.*).

But Big Seven could not abandon these exhibits for they bespoke the real truth of its case. Even the cover records such as there were had produced "peanuts", and there simply was no validity to the "enhancement" claim. In fact those exhibits coincided almost precisely with the royalty history of "Ya Ya" and "You Can't Catch Me", which showed that the two Big Seven songs which Lennon did record did not generate cover records and royalties (*See* DX EK at E 444). In the year following the release of those two songs on the "Rock 'n' Roll" album subsequent royalties amounted to "peanuts". In fact there was one recording of "Ya Ya" and no recordings of "You Can't Catch Me" in the year following Lennon's "Rock 'n' Roll" album containing these songs. (*See* July 13, 1976 opinion at A. 202a). Big Seven's case was then reduced to *one song*—"Close To You".

However, any reliance on the history of "Close To You" was misplaced as Irwin Robinson, Lennon's expert witness, demonstrated. Robinson, a musician, attorney and Vice President of the Screen Gems Columbia Music Division of Columbia Pictures Industries, Inc., with 19 years experience in music publishing (A. 3870-71), testified on cross-examination that the Carpenters' version of "Close to You", released as a single and an album, was heard by millions of people, including recording artists, because it was a "single" (A. 3875, 3907-08).* He further testified that there was a reason why the song had not been popular prior to the Carpenters' version and subsequently had become very successful:

> "Well, I think that Close to You was written by Bacharach, came out originally, I don't know how old it is, maybe six, seven or eight years before that period of time, in a period when Mr. Bacharach's writing was not very popular in general. He had an

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* One of Big Seven's expert witnesses recognized the importance of the Carpenters' "single" of "Close to You" and "singles" generally (Bienstock, A. 3591-93).

> atonal quality to the kind of songs that he wrote. I think when Close to You was finally released or came out by the Carpenters, Mr. Bacharach's writings were very much in vogue . . " (A. 3909-10)

Robinson elaborated on his explanation of the success of "Close to You" in response to questions by the Court (A. 3919).

He testified to the following differences between "Angel Baby" and "Close to You":

(a) "Angel Baby" had original exposure as a hit by Rosie and the Originals in the early 1960's. If it had been a good song it would have been picked up and re-recorded by other artists (A. 3918). "Close to You," on the other hand, never received original exposure but when it was sung by the Carpenters and given exposure, the *quality* of the song made it a hit (A. 3919).

(b) "Angel Baby" was a "sound" hit (A. 3885) (*i.e.*, its success was based principally upon the unique sound of the singing group rather than the inherent quality of the composition) (A. 3883-84, 3886). "Close to You" was not a "sound" hit—it was inherently an attractive composition.

(c) "Close to You" was a single and as such was exposed to millions of people including artists and would appeal to a "broad-based segment of the artistic community". (A. 3916)

The basic theme of Robinson's testimony was that "the value of a song, the judgment as to a song's worth, is always based on the marketability of that song to other artists" (A. 3881-82), and " . . . if Angel Baby in my estimation is not a song that will fit very many artists in the future, it won't become more fitting to artists because it was recorded by John Lennon." (A. 3882) His conclusion was that having John Lennon record "Angel Baby" would be of no value to him (A. 3887).

In contrast to Robinson's specific testimony about "Angel Baby", none of Big Seven's witnesses testified as to the probable value of "Angel Baby" and while their testimony was positive, it was not specific and was highly speculative. Characteristic of that testimony are words and phrases like "it is entirely possible" (A. 3577), "no way of really knowing" (A. 3596), "no way of placing a dollar figure on the enhancement of the copyright of a song when it's recorded by John Lennon" (A. 3610), "I would not say for certainty, but it could have conceivably happened." (A. 3634)

The speculative nature of Big Seven's claim is conclusively demonstrated by the following:

(1) Out of 20,000 songs not one from Levy's catalogue was produced to show catalogue enhancement and the only song advanced in support of Big Seven's claim, "Close to You", is not even remotely relevant as to the value of Lennon recording "Angel Baby", or some unknown song.

(2) The four songs produced by Big Seven from the Levy catalogue proved that the income from records after Lennon would be "peanuts"—the opposite of what it was attempting to prove.

(3) Only Irwin Robinson testified specifically as to the individual quality of a song and the importance of that in determining the possibility of enhancement. As Robinson said in response to a question from the Court:

> "Well, I think, your Honor, that each song is unique. I don't think one can take the circumstances which relate to one song and simply translate them to another and expect to get the same result." (A. 3919)

Even assuming that Big Seven had proved that cover records would follow the Lennon recording of "Angel Baby" the District Court would have had to have predicted the amount of money which an unknown number of nonexistent records—the extent to which they would meet with

public favor being "entirely conjectural"—would generate, something it could not properly or possibly do. *Hewlett* v. *Caplin*, 275 App. Div. 797, 88 N.Y.S.2d 428-29 (1st Dept. 1945).

See also, Freund v. *Washington Square Press, Inc.*, 34 N.Y.2d 382, 357 N.Y.S.2d 857, 861 (1974); *James Wood General Trading Establishment* v *Coe*, 297 F.2d 651, 658 (2d Cir. 1961); *Gruber* v. *S-M News Company*, 126 F.Supp. 442, 445-46 (S.D.N.Y. 1954).

Big Seven is not entitled to damages over and above the $6,795* awarded by The District Court.

VIII

Big Seven Waived and Is Estopped from Asserting Any Claim for Specific Performance

The second part of the October 1973 Settlement Agreement, as stated in open court by Lennon's attorney, Michael Graham, included, *inter alia*:

> *"John Lennon will use his best efforts* to cause Apple . . . to license to Big Seven, three songs from the Apple non-Beatle catalogue... ."
>
> (PX 11 at E 15)
> (Emphasis added)

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* The record supported the finding that Big Seven was only entitled to recover that portion of royalties which its foreign subsidiaries remitted to it. Big Seven's counsel conceded that the 50% figure used by the Court was accurate (A. 4076-77). Big Seven's argument that it should be awarded damages for losses by its foreign subsidiaries because Capitol was awarded damages for its Canadian subsidiary, is without merit. This question was raised for the first time during final argument on the October 1973 Settlement Agreement claim, almost two months after the decision on the counterclaims awarding Capitol damages. Big Seven's counsel conceded that there had been no prior objection to Capitol's standing to recover for losses suffered by its Canadian subsidiaries (A. 4070-71). Furthermore, the difference is that Big Seven's foreign subsidiaries are not permitted to remit the 50% to it while Capitol's Canadian subsidiary, as explained by its counsel, is and does, remit its profits to Capitol (A. 4072-74), and Big Seven has never claimed that the facts with respect to Capitol are otherwise.

See also, Plaintiffs' Exhibit 12 (E 19-20).

The evidence shows that Lennon more than fully met his obligations in making the tender contained in his attorney's December 31, 1974 letter (PX 30 at E 29).* The fact that Big Seven refused to accept the proffered license does not and cannot alter the fact of Lennon's performance.

The District Court, in denying specific performance to Big Seven, stated:

> "I hold that Levy's failure to accept Lennon's performance prevented Lennon from complying with the second phase of the settlement agreement. Under these circumstances Big Seven has no right to obtain a decree of specific performance." (A. 204a)

Big Seven asserts that the District Court's refusal to award specific performance was erroneous for two reasons (Plaintiffs' Brief, p. 54), reasons about which the District Court stated: "These arguments of Big Seven are of no weight, and do not deserve detailed discussion". (A. 205a) Consideration of the relevant facts and apposite law shows just how correct Judge Griesa's ruling was.

The December 31, 1974 offer constituted full performance. Big Seven argues that the royalty rate authorized by Apple ; 2¢, whereas the October 1973 Settlement Agreement ɔke in terms of Big Seven's "customary rates." Big even's evidence (PX 375 at E 200) shows only that Big Seven's rates ranged from $.005 up to 2¢; these numbers may be useful in giving an "average" rate (which was the purpose of PX 375) but it does not define what is "customary." More importantly, however, it is obvious that under the October 1973 Settlement Agreement, Big

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* Not only did Lennon offer Big Seven licenses to three non-Beatle Apple master recordings, he offered Big Seven the opportunity to choose which three recordings it wanted out of a list of seven—a list comprised not of unknowns, but rather recordings by major artists which had been smash hits (A. 3562).

Seven had the duty of informing Lennon of the extent to which its customary rate was lower than the 2¢ statutory rate reflected in the Apple resolution (DX CE at E 319). Therefore, since Big Seven's failure to provide the necessary information was the cause for such a defect in the tender of the license (assuming that 2¢ is not Big Seven's customary rate), Big Seven, as a matter of law, cannot attack the validity thereof on this ground:

> "It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due him or of a condition upon which his own liability depends, he cannot take advantage of the failure."
>
> 5 S. WILLISTON, Contracts §677, p. 224 (3d ed. 1961) (footnote omitted)
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> • • • • •
>
> "It is as effective an excuse of performance of a condition that the promisor has hindered performance as that he has actually prevented it."
>
> *Id.* §677A, pp. 233-34 (footnote omitted)

See, Grad v. *Roberts*, 14 N.Y.2d 70, 75, 248 N.Y.S.2d 633, 637 (1964). As Judge Griesa observed, any problem with the royalty rate could easily have been cured "if the door hadn't been slammed" by Levy (A. 3562).

As for the complaint that the tendered license was for a period of no more than 10 years, Big Seven concedes that the October 1973 Settlement Agreement was silent as to duration. At his deposition, Levy, Big Seven's president, testified that, in the absence of a contrary contract provision, industry custom was that licenses of the type in issue were 2-3 years and he sought to define the duration of his alleged oral contract with Lennon by this customary time period (DX CM-1, pp. 128-29). By Levy's own standard, then, Lennon in fact offered Big Seven a license 7-8

years *longer* in duration than was required under the October 1973 Settlement Agreement.*

Waiver is the intentional relinquishment or abandonment of a known right or privilege (*Barker* v. *Wings*, 407 U.S. 514 (1972); 21 N.Y. Jur. Waiver §88) and a contract right once waived may not be enforced by specific performance or otherwise. 81 C.J.S. Specific Performance §22; 21 N.Y. Jur. Waiver §98. There is no question that Levy's January 9th letter was an explicit, intentional and unequivocal waiver of the license being offered to Big Seven. Even assuming, *arguendo*, that Lennon's tender was technically defective, in the face of Levy's unequivocal refusal to accept any performance whatsoever, what more could Lennon have done? He could not cure defects of which he was unaware, and he could not force Big Seven to take what it did not want; yet now Big Seven seeks by judicial mandate to compel Lennon to render that which it so vehemently rejected.**

The black letter law is that ". . . where an obligee has manifested to the obligor that tender, if made, will not be

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* Irrespective of the particulars of the royalty rate and duration issues, it is manifestly clear, under a long and well-settled line of cases, that Big Seven, having rejected the tender on one basis only—that the October 1973 Settlement Agreement was "no longer of any effect" (PX 31 at E 30)—is barred from setting up some other ground. *See, e.g.*, Ohio and Miss. Ry. Co. v. McCarthy, 96 U.S. 258, 267-68 (1878); Littlejohn v. Shaw, 59 N.Y. 188, 191 (1899).

** Big Seven asks this Court, in the event it does *not* remand the case for further proceedings on the oral contract claims, to enter ". . . an order directing Lennon to perform the second phase of the October 1973 Settlement Agreement or, in the alternative, awarding appropriate money damages." However, even were it determined that the District Court was in error, we fail to understand how this Court is in a position to fashion such an order of specific performance. Although Lennon was once willing and authorized to offer a 10-year license, he is no longer agreeable to doing so. What duration then should the Court choose? Furthermore, how can this Court determine, on the record before it, what Big Seven's "customary rates" are, much less what amount of money damages are appropriate, if it were inclined to award the alternative relief Big Seven requests.

accepted, the obligor is excused from making tender as it would be at most merely a futile gesture." 15 S. WILLISTON, Contracts §1819, p. 447 (3 ed. 1972) (footnote omitted). Following Big Seven's declination of the license any attempt at a further tender certainly would have been but a "futile gesture."

As specific performance is an equitable remedy, it was within the sound discretion of the District Court to refuse to decree it under the circumstances herein presented. *See Lipschitz* v. *Gutwirth,* 304 N.Y. 58 (1952). Recognizing that it seeks to invoke the equity power of the Court, Big Seven argues that (a) Levy, in rejecting the license, relied erroneously on "what he believed to be a superseding October 1974 agreement", and (b) that Levy's "consequent delay" in seeking to obtain the performance he had once refused caused Lennon no "prejudice whatsoever." However, not only did Judge Griesa find that Levy did not have a basis upon which to believe he had a contract giving him authority to advertise and sell an album of Lennon's recordings, he specifically found that Levy did not believe that he had such a right (A. 3474). Moreover, as shown in the affidavit of James M. Bergen, submitted in support of Lennon's application for attorney's fees (which was denied), sworn to March 8, 1976, Lennon, because of this "consequent delay", incurred up to that point legal expenses in excess of $130,000. It is difficult, indeed, to understand how Lennon, after incurring legal fees of this magnitude—which do not include the fees incurred on the latter part of the trial or on this appeal—will be obtaining a "windfall" (Plaintiffs' Brief, p. 56) if the judgment of the District Court is affirmed.

For the foregoing reasons, it is clear that the District Court did not err in refusing to grant the equitable relief of specific performance to a party whose own actions had been so inequitable.

IX

Big Seven Is Estopped from Recovering Damages on the October 1973 Settlement Agreement Claim

Big Seven amended the amended complaint herein to assert the claim against Lennon for breach of the October 1973 Settlement Agreement at a conference before the Court on February 27, 1976 after the Court's finding of no oral contract.

Big Seven, by this amendment asserted a claim which Levy swore under oath at trial it no longer had any right to make (A. 173). It is for this reason that Lennon moved at trial to dismiss the claim on the ground that Big Seven was estopped from asserting it.

Prior to and during trial plaintiffs were extremely careful to argue that the alleged October 8, 1974 agreement was a novation which superseded and completely replaced the October 1973 Settlement Agreement. For, if plaintiffs had taken the position that there was any vitality whatsoever left to that agreement, the "agreement" supposedly reached on October 8, 1974 would have been an executory accord—unenforceable as a matter of law pursuant to N.Y. Gen. Oblig. Law §15-501(1) and (2).*

The doctrine of judicial estoppel arises out of the recognition by the courts that to permit a party "to blow hot and cold" with reference to the same transaction, depending upon which position best suits the exigencies of the situation at hand is inequitable to his adversary and does violence to the integrity of the judicial process.

> "The rule is well established that during the course of litigation a party is not permitted to assume or occupy inconsistent and contradictory positions, and while this rule is frequently referred to as 'judicial estoppel', it more properly is a rule which estops a party to play

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* *See* Addendum.

fast-and-loose with the courts." 31 C.J.S. Estoppel §117, p. 623.

Perhaps the most graphic factual illustration of the application of judicial estoppel—and one far less compelling in favor of its application than the instant case—is presented by *Houghton* v. *Thomas,* 220 App. Div. 415, 211 N.Y.S. 630 (1927), *aff'd,* 248 N.Y. 523, 162 N.E. 509 (1928). In *Houghton,* an attorney who had testified, as a witness in a fee suit commenced by his former firm against a client, that no money was due from the client, was estopped, by reason of his testimony, from recovering from his former partners his portion of the fee, which they recovered despite his testimony. The Court said:

> "We think defendant . . . is estopped from a recovery of any judgment in this counterclaim, and that he comes within the rule that a claim made or position taken in a former action or judicial proceeding will estop the party from making any inconsistent claim or taking a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party. . . . He has endeavored to defeat the claim, and he should not now be permitted to assert a part of its existence in his favor." 221 N.Y.S. at 637.

Similarly, Big Seven should not have been permitted to use the lower Court's adverse (A. 174a) ruling on a claim —that the October 1973 Settlement Agreement was abrogated—which Big Seven vigorously asserted throughout trial as a basis for reversing its position on that claim. *See also, Tymon* v. *Linski,* 16 N.Y.2d 293, 266 N.Y.S.2d 357 (1965); *Hurd* v. *DiMento & Sullivan,* 440 F.2d 1322 (5th Cir.), *cert. denied,* 404 U.S. 862, *rehearing denied,* 404 U.S. 961 (1971); *Smith* v. *Boston Elevated Ry. Co.,* 184 Fed. 387 (1st Cir. 1911); *Selected Risks Insurance Co.* v. *Kobelinski,* 421 F. Supp. 431 (E.D. Pa. 1976); *In re Mesa's Estate,* 87 Misc. 242, 149 N.Y. Supp. 536 (Surr. Ct. N.Y. Co. 1914), aff'd 219 N.Y. 566 (1916); *Matter of Swales,* 60 App. Div. 599, 70 N.Y.S. 220 (4th Dept. 1901), *aff'd,* 172 N.Y. 651, 65 N.E. 1122 (1902).

There is no conflict between liberal procedural statutes and rules which permit inconsistent and/or hypothetical pleading and the doctrine of judicial estoppel. *Compare* Commentary, 7B McKinney, C3002:14, pp. 533-35 *with* Commentary, 7B McKinney, C3014:6, pp. 8-9. Rule 8(e)(2), F.R. Civ. P., although authorizing the *pleading* of inconsistent claims, does not authorize or condone the assuming of inconsistent factual positions at trial. *Cf. Bailey's Bakery, Ltd.* v. *Continental Baking Co.*, 235 F. Supp. 705, 717 (D. Haw. 1964) *cert. denied*, 393 U.S. 1086, *rehearing denied*, 394 U.S. 967 (1968). And, Rule 8(e)(2) is, in any event, expressly subject to the "good faith" limitations of Rule 11, F.R. Civ. P. The case cited by the District Court in its July 13, 1976 opinion in support of the denial of Lennon's motion to dismiss (*Twentieth Century Fox Film Corp.* v. *National Publishers, Inc.*, 294 F.Supp. 10 (S.D.N.Y. 1968)) is inapposite since it involved election of remedies—a doctrine related to but wholly distinct from judicial estoppel.

Indeed, in addition to plaintiffs' pleadings and proof, the manufacture, promotion and sale of the "Roots" album was sufficient in and of itself to give rise to an estoppel. The District Court found that:

> "On January 29 or 30 Seider told Levy that there could be no agreement permitting Levy to distribute the album. *Levy decided that he would nevertheless proceed with the album*, using the tapes he had received from Lennon in November." (A. 177a-78a) (emphasis added)

Surely, having acted in blatant disregard of Lennon's legal rights, Levy (through his company Big Seven) should not have been permitted to proceed as if it never happened.

Judge Griesa, in the context of denying Big Seven's outrageous request for costs, although previously refusing to find an estoppel, really articulated Lennon's estoppel argument:

> "I think it was a matter of grace, really, they [Big Seven] were permitted at a late date to really change the theory of their case and assert a claim based on the October, 1973 agreement. That was contrary to the theory on which they originally started the action. It was asserted and allowed because I felt that all disputes here should be wound up.
>
> "*The whole procedure of coming in on one theory and then, after losing, asserting a completely contrary theory created a lot of litigation* which the court was obliged to here [*sic*] and everybody was entitled to present."
>
> (A. 4331-32) (emphasis added)

We concur with everything said by Judge Griesa, except we respectfully disagree with his conclusion that Big Seven, under these circumstances, "was entitled to present" any proof on damages resulting from a breach of a contract it swore, through its president, Levy, had been abrogated.

Accordingly, the District Court's award of $6,795 damages to Big Seven, although properly calculated, should nevertheless be reversed.

CONCLUSION

The Judgment dismissing plaintiffs' affirmative claims and awarding damages of $145,300 to Lennon and permanently enjoining plaintiffs and Levy should be affirmed. So much of the Judgment as awarded damages to Big Seven should be reversed and Big Seven's claim dismissed.

Dated: New York, New York
January 10, 1977

Respectfully submitted,

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ADDENDUM

ADDENDUM

Statutes Cited

New York General Obligations Law §5-701 (McKinney 1964):

Agreements required to be in writing

Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

1. By its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime. . . .

New York General Obligations Law §15-501 (McKinney 1964):

Executory accord

1. Executory accord as used in this section means an agreement embodying a promise express or implied to accept at some future time a stipulated performance in satisfaction or discharge in whole or in part of any present claim, cause of action, contract, obligation, or lease, or any mortgage or other security interest in personal or real property, and a promise express or implied to render such performance in satisfaction or in discharge of such claim, cause of action, contract, obligation, lease, mortgage or security interest.

2. An executory accord shall not be denied effect as a defense or as the basis of an action or counterclaim by reason of the fact that the satisfaction or discharge of the claim, cause of action, contract, obligation, lease, mortgage or other security interest which is the subject of the accord was to occur at a time after the making of the accord, provided the promise of the party against whom it is sought to enforce the accord is in writing and signed by such party or by his agent. If executed by an agent, any promise required by this section to be in writing which affects or relates to real property or an interest therein as defined in section 5-101 in any manner stated in sub-

divisions one or two of section 5-703 of this chapter shall be void unless such agent was thereunto authorized in writing. . . .

New York Civil Rights Law §50 (McKinney 1976):

Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

New York Civil Rights Law §51 (McKinney 1976):

Action for injunction and for damages

Any person whose name, portrait or picture is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait or picture, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait or picture in such manner as is forbidden or declared to be unlawful by the last section, the jury, in its discretion, may award exemplary damages. But nothing contained in this act shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from exhibiting in or about his or its establishment specimens of the works of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this act shall be so construed as to prevent any person, firm or corporation from using the name, portrait or picture of any manufacturer or dealer in conection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait or picture used in connection therewith; or from using the name, portrait or picture of any author, composer or artist in connection with his literary, musical or artistic productions which he has sold or disposed of with such name, portrait or picture used in connection therewith.

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